Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States

W. R. GRACE & CO., ET AL.,

Petitioners,

v.

MARGARET CHAKARIAN; JOHN DOES 1-1000;
HOME SAVING TERMITE CONTROL;
ABNER DEFENDANTS; CAROL GERARD; KERI EVANS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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WILSON EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Whether a federal court's power to enjoin a state proceeding as a substantive remedy in a federal case is limited to state proceedings over which the federal court could independently exercise subject-matter jurisdiction.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners hereby state that they are W. R. Grace & Co. (f/k/a Grace Specialty Chemicals, Inc.) and 61 of its subsidiaries and affiliates that filed Chapter 11 cases on April 2, 2001:

1. W. R. Grace & Co.-Conn.
2. A-1 Bit & Tool Co., Inc.
3. Alewife Boston Ltd.
4. Alewife Land Corporation
5. Amicon, Inc.
6. CB Biomedical, Inc. (f/k/a Circe Biomedical, Inc.)
7. CCHP, Inc.
8. Coalgrace, Inc.
9. Coalgrace II, Inc.
10. Creative Food 'N Fun Company
11. Darex Puerto Rico, Inc.
12. Del Taco Restaurants, Inc.
13. Dewey and Almy, LLC (f/k/a Dewey and Almy Company)
14. Ecarg, Inc.
15. Five Alewife Boston Ltd.
16. G C Limited Partners I, Inc. (f/k/a Grace Cocoa Limited Partners I, Inc.)
17. G C Management, Inc. (f/k/a Grace Cocoa Management, Inc.)
18. GEC Management Corporation
19. GN Holdings, Inc.
20. GPC Thomasville Corp.
21. Gloucester New Communities Company, Inc.
22. Grace A-B Inc.
23. Grace A-B II Inc.

24. Grace Chemical Company of Cuba
25. Grace Culinary Systems, Inc.
26. Grace Drilling Company
27. Grace Energy Corporation
28. Grace Environmental, Inc.
29. Grace Europe, Inc.
30. Grace H-G Inc.
31. Grace H-G II Inc.
32. Grace Hotel Services Corporation
33. Grace International Holdings, Inc. (f/k/a Dearborn International Holdings, Inc.)
34. Grace Offshore Company
35. Grace PAR Corporation
36. Grace Petroleum Libya Incorporated
37. Grace Tarpon Investors, Inc.
38. Grace Ventures Corp.
39. Grace Washington, Inc.
40. W. R. Grace Capital Corporation
41. W. R. Grace Land Corporation
42. Gracoal, Inc.
43. Gracoal II, Inc.
44. Guanica-Caribe Land Development Corporation
45. Hanover Square Corporation
46. Homco International, Inc.
47. Kootenai Development Company
48. L B Realty, Inc.
49. Litigation Management, Inc. (f/k/a GHSC Holding, Inc.; Grace JVH, Inc.; Asbestos Management, Inc.)
50. Monolith Enterprises, Incorporated
51. Monroe Street, Inc.
52. MRA Holdings Corp. (f/k/a Nestor-BNA Holdings Corporation)

53. MRA Intermedco, Inc. (f/k/a Nestor-BNA, Inc.)
54. MRA Staffing Systems, Inc. (f/k/a British Nursing Association, Inc.)
55. Remedium Group, Inc. (f/k/a Environmental Liability Management, Inc., E&C Liquidating Corp., Emerson & Cuming, Inc.)
56. Southern Oil, Resin & Fiberglass, Inc.
57. Water Street Corporation
58. Axial Basin Ranch Company
59. CC Partners (f/k/a Cross Country Staffing)
60. Hayden-Gulch West Coal Company
61. H-G Coal Company

Petitioner W. R. Grace & Co. is a publicly held Delaware holding company with no parent corporation. No publicly held corporation owns 10% or more of its stock. It owns, or through one of its wholly owned subsidiaries owns, 100% of the stock of the 61 affiliated debtors.

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INTRODUCTION

In our federal system, few federal judicial powers are more consequential than the power to enjoin state proceedings. For that very reason, since the founding of the Republic, both Congress and this Court have limited the power of the federal courts to issue such injunctions. The Anti-Injunction Act, which traces its roots back to 1793, authorizes such injunctions in only three defined circumstances, and the *Younger* abstention doctrine imposes additional substantive limits. *See, e.g.*, *Younger v. Harris*, 401 U.S. 37, 43-55 (1971).

This case presents the question whether the federal courts' power to enjoin state proceedings is limited in a far more fundamental way—one that would render the careful limitations of the Anti-Injunction Act and the *Younger* doctrine largely nugatory. The Third Circuit held below, in conflict with other circuits, that a federal court's power to enjoin a state proceeding as a remedy in a federal case is limited to state proceedings over which the federal court could independently exercise subject-matter jurisdiction. That holding renders the federal courts powerless to vindicate federal rights from infringement in a broad range of proceedings (including state criminal and administrative proceedings) beyond the federal courts' subject-matter jurisdiction. That radical curtailment of federal judicial authority is wholly unwarranted: neither Congress nor this Court has ever suggested that the federal courts' injunctive powers are limited by their subject-matter jurisdiction. To the contrary, the *Younger* abstention doctrine, which involves federal judicial power to enjoin state *criminal*

proceedings, would make no sense if federal courts could enjoin only those proceedings over which they could exercise subject-matter jurisdiction.

The decision below represents yet another in a long line of cases that confuse a federal court's subject-matter jurisdiction with its substantive authority. Whether a federal court, acting in a case within its subject-matter jurisdiction, may enjoin a state proceeding as a remedy in the federal case does not implicate the court's subject-matter jurisdiction; rather, it implicates the federal court's substantive remedial power.

It is hard to overstate the implications of the ruling below. A federal court's injunctive powers, while limited, are essential to protecting federal constitutional and statutory rights in a wide variety of proceedings. By recasting those limits in jurisdictional terms, the Third Circuit has not only exacerbated a circuit conflict but also compromised the federal courts' ability to vindicate federal rights.

OPINIONS BELOW

The Third Circuit's opinion is reported at 591 F.3d 164 and reprinted in the Appendix ("App.") at 1-22a. The Third Circuit's unreported order denying rehearing is reprinted at App. 23-24a. The district court's opinion and order are reported at 2008 WL 3522453, and reprinted at App. 25-39a. The bankruptcy court's initial decision is reported at 366 B.R. 295, and reprinted at App. 40-53a. The bankruptcy court's decision denying reconsideration is reported at 384 B.R. 670, and reprinted at App. 54-68a.

JURISDICTION

The Third Circuit issued its decision on December 31, 2009, and denied a timely rehearing petition on February 18, 2010. App. 2a, 24a. On May 12, 2010, Justice Alito extended the time within which to file this petition until June 18, 2010. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The Bankruptcy Code provides in relevant part:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

11 U.S.C. § 105(a).

The bankruptcy provision of the Federal Judicial Code provides in relevant part:

> Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334(b).

The Anti-Injunction Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283.

STATEMENT OF THE CASE

A. Background

In response to an avalanche of asbestos-related claims, petitioners W. R. Grace & Co. and 61 subsidiaries and affiliates (collectively Grace), filed for Chapter 11 bankruptcy protection in the U.S. Bankruptcy Court for the District of Delaware (No. 01-1139) on April 2, 2001. The Chapter 11 filing resulted in an automatic stay of all asbestos-related personal-injury and property-damage actions against Grace. *See* 11 U.S.C. § 362(a).

In conjunction with the Chapter 11 filing, Grace also initiated an adversary proceeding in the bankruptcy court (No. 01-771). The complaint in that proceeding sought (1) a declaration that the automatic stay under § 362(a) applied to asbestos-related actions against various non-bankrupt entities whose purported liability was derivative of Grace's liability, and (2) an injunction under 11 U.S.C. § 105(a) against prosecution of any such actions. The bankruptcy court (Newsome, J.) immediately entered a temporary restraining order barring prosecution of such actions. *See* App. 79-82a. On May 3, 2001, the district court (Farnan, J.) replaced that order with a preliminary injunction temporarily enjoining

prosecution of then-pending actions against certain third parties. *See* App. 75-78a. On January 22, 2002, the bankruptcy court (Fitzgerald, J., by designation) expanded the preliminary injunction to include certain additional affiliates and to reinstate the bar against the commencement of new actions against affiliates arising from alleged exposure to asbestos, whether directly or indirectly caused by Grace. *See* App. 69-74a. The injunction did not extinguish any claims; rather, it simply halted all state court actions within its scope to protect Grace from distraction and prejudice during its Chapter 11 reorganization.

Respondents, the so-called Libby Claimants, are a group of plaintiffs who seek redress for alleged asbestos-related injuries arising out of Grace's former mining operations in Libby, Montana. Following entry of the preliminary injunction, the Libby Claimants have attempted several times to pursue their claims against Grace indirectly by suing non-bankrupt third parties for injuries allegedly caused by exposure to asbestos from Grace's mining operations in Libby.

The Libby Claimants first moved to modify the injunction to pursue actions against one of Grace's insurers, Maryland Casualty Company, in state court. The bankruptcy court denied the motion. *See* Order (6/20/02), D. Del. Bankr. No. 01-771 Dkt. 109. On appeal, however, the district court (Wolin, J., by designation) vacated the bankruptcy court's order, holding that the court lacked subject-matter jurisdiction over the state proceedings sought to be enjoined. *See* Order (8/8/03), D. Del. Bankr. No. 01-771 Dkt. 154 (describing the "sole issue" as "whether

the claims of the asbestos claimants are 'related to' the Grace bankruptcy proceeding" within the meaning of the bankruptcy jurisdictional statute, 28 U.S.C. § 1334(b)). The Third Circuit reversed, holding that the district court's focus on subject-matter jurisdiction represented "a slight detour" from the real issue at hand, *i.e.*, the scope of the bankruptcy court's remedial authority under § 105(a) in the Grace bankruptcy case within its jurisdiction. *Gerard v. W. R. Grace & Co.*, 115 F. App'x 565, 567 (3d Cir. 2004) (unpublished) (Rendell, J.). Concluding that the injunction represented a lawful exercise of such authority, the Third Circuit vacated the district court's order and affirmed the bankruptcy court's order. *See id.* at 570.

The Libby Claimants next attempted to pursue their claims against Grace indirectly by suing Montana Vermiculite Company, a predecessor owner of Grace's mining operations in Libby. Grace moved to extend the preliminary injunction to encompass those actions, and the bankruptcy court granted the motion. *See* Order & Op. (10/12/04), D. Del. Bankr. No. 01-771 Dkts. 298, 299; Am. Order (2/25/05), D. Del. Bankr. No. 01-771 Dkt. 358. The Libby Claimants did not appeal that ruling.

The Libby Claimants also attempted to pursue their claims against Grace indirectly by suing Burlington Northern & Santa Fe Railroad, which transported minerals from the Libby mine. Grace again moved to extend the preliminary injunction to encompass those actions, and the bankruptcy court again granted the motion. *See* Mem. Op. & Order (4/11/08), D. Del. Bankr. No. 01-771 Dkt. 498. The

Libby Claimants appealed that order to the district court (D. Del. No. 09-115), where it remains pending.

B. This Litigation

This petition arises from yet another attempt by the Libby Claimants to impose liability on a non-bankrupt third party for alleged injuries arising out of Grace's mining operations in Libby. This time, the Libby Claimants sued the State of Montana in state court on the theory that the State should have better regulated those operations. After the Montana Supreme Court decided that the Libby Claimants thereby stated a cognizable claim under state law, *see Orr v. State*, 106 P.3d 100, 104-18 (Mont. 2004), Grace again moved to expand the preliminary injunction in its bankruptcy case to encompass these actions.

On April 16, 2007, the bankruptcy court denied Grace's motion for lack of subject-matter jurisdiction over the Montana state-court actions. *See* App. 40-53a. The court held that Grace's motion did not satisfy the "generally accepted test for determining whether a bankruptcy court has subject matter jurisdiction over litigation between nondebtor third parties ...." App. 47a. Grace promptly moved for reconsideration, noting that the bankruptcy court undoubtedly had subject-matter jurisdiction over the Grace bankruptcy case, so that the only question was whether the court had the substantive power to enjoin the Montana state-court actions as a remedy in that federal case. *See* D. Del. Bankr. No. 01-771 Dkt. 426. The bankruptcy court denied the motion, insisting that it could not enjoin prosecution of the Montana state-court actions without exercising

subject-matter jurisdiction over them. *See* App. 61-65a.

Grace appealed to the district court (Buckwalter, J., by designation), which affirmed the bankruptcy court's order. *See* App. 25-39a. Like the bankruptcy court, the district court held that a federal court may not enjoin prosecution of a proceeding beyond its subject-matter jurisdiction. *See* App. 30-37a.

Grace then appealed to the Third Circuit, which again affirmed. *See* App. 1-22a. Like the bankruptcy court and the district court, the Third Circuit held that a federal court may not enjoin prosecution of a proceeding beyond its subject-matter jurisdiction. *See* App. 10-22a.

This petition follows.

REASON FOR GRANTING THE WRIT

A Federal Court's Power To Enjoin A State Proceeding As A Substantive Remedy In A Federal Case Is Not Limited To State Proceedings Over Which The Federal Court Could Independently Exercise Subject-Matter Jurisdiction.

The Third Circuit gave the wrong answer here because it asked the wrong question. The Third Circuit focused on whether the Libby Claimants' state-court actions against Montana fall within the scope of federal bankruptcy jurisdiction—*i.e.*, whether those actions are ones "arising under [the federal Bankruptcy Code], or arising in or related to cases under [the federal Bankruptcy Code]." 28 U.S.C. § 1334(b). But that is not the question at all. It is undisputed that the bankruptcy court has subject-matter jurisdiction over the Grace Chapter

11 case, which "aris[es] under" the federal Bankruptcy Code. *See* App. 10a n.7. Whether the bankruptcy court can enjoin prosecution of the Libby Claimants' state-court actions against Montana as a remedy in that federal case is a question of the court's substantive injunctive power under the Bankruptcy Code, 11 U.S.C. § 105(a), not its subject-matter jurisdiction.

The Third Circuit thus missed the point by devoting the bulk of its analysis to the question whether the Montana state-court actions fall within the scope of federal bankruptcy jurisdiction, *see* App. 11-17a—a point that Grace did not even contest. The Third Circuit specifically rejected Grace's argument that "the Bankruptcy Court does not need one of the three statutory foundations of bankruptcy jurisdiction—arising under, arising in, or related-to jurisdiction—to expand the § 105(a) injunction to include the State of Montana," App. 19a, in light of the undisputed federal jurisdiction over the Chapter 11 case.

Grace's position, the Third Circuit declared, "stands in stark contrast to the basic premise that 'federal courts are courts of limited jurisdiction; they exercise only the authority conferred on them by Art. III and by congressional enactments pursuant thereto.'" App. 20a (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 692 (1986)). But Grace's position is entirely consistent with that premise. Grace does not contend that a federal court may enter an injunction in the absence of subject-matter jurisdiction. But the question is: subject-matter jurisdiction over which proceeding? The answer is subject-matter jurisdiction over the case in which the

injunction is sought, not subject-matter jurisdiction over the proceeding sought to be enjoined. Once a federal court has properly exercised subject-matter jurisdiction over a case, its remedial authority is not limited by its subject-matter jurisdiction. Rather, a federal court may enjoin a state proceeding as a remedy in a federal case *regardless* of whether the federal court could exercise independent subject-matter jurisdiction over the state proceeding. *See, e.g., Syngenta Crop. Prot., Inc. v. Henson*, 537 U.S. 28, 32-34 & n.* (2002); *McFarland v. Scott*, 512 U.S. 849, 857-58 (1994). Indeed, a federal court may, in appropriate circumstances, enjoin state actors before they even launch a proceeding, *see, e.g., Dombrowski v. Pfister*, 380 U.S. 479, 483-92 & n.2 (1965); *Ex parte Young*, 209 U.S. 123, 156 (1908), thereby refuting the notion that a federal court must be able to exercise subject-matter jurisdiction over such a proceeding before an injunction is warranted.

By enjoining a state proceeding—or the prosecution of such a proceeding—to give a debtor "breathing room" while a Chapter 11 reorganization is pending, after all, a federal court is not exercising adjudicatory authority over that proceeding.[1]

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[1] As this Court has long recognized, there is no legal distinction between enjoining a state proceeding directly and enjoining a litigant from prosecuting such a proceeding. *See, e.g., County of Imperial, Cal. v. Munoz*, 449 U.S. 54, 58-59 (1980); *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 287-88 (1970). Thus, although the injunction here by its terms enjoins the "prosecution" of certain specified actions against non-debtors, App. 73a, it is tantamount to an injunction against those actions.

Rather, the federal court is simply providing a temporary federal remedy in a federal case. "A temporary status quo injunction simply does not adjudicate the parties' underlying dispute." Ralph Brubaker, *Nondebtor Releases & Injunctions in Chapter 11: Revisiting Jurisdictional Precepts & the Forgotten Callaway v. Benton Case*, 72 Am. Bankr. L.J. 1, 44-45 (1998); *see generally id.* at 42-47 & nn.182-201; *see also* Ralph Brubaker, *Bankruptcy Injunctions & Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. Ill. L. Rev. 959, 1046 (1997) (citing *Continental Ill. Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pac. R'way Co.*, 294 U.S. 648 (1935), as having "recognized and articulated a critical distinction between jurisdiction to adjudicate an underlying controversy and jurisdiction to provisionally enjoin an action that might prove harmful to the bankruptcy estate").

Whether such an injunction is proper depends on the scope of the federal court's substantive remedial power, not its subject-matter jurisdiction. "Debtors seeking a bankruptcy court injunction to prevent creditor action against third parties may well not be entitled to the requested relief in a given case. But the denial of such relief stems not from the court's lack of authority to act but rather from limitations upon the historic exercise of the court's equitable discretion." *In re Monroe Well Serv., Inc.*, 67 B.R. 746, 754 (Bankr. E.D. Pa. 1986).

The Third Circuit asserted, however, that "[i]f we were to accept Grace['s] ... position, ... a bankruptcy court would have power to enjoin any action, no matter how unrelated to the underlying bankruptcy

it may be, so long as the injunction motion was filed in the adversary proceeding" in the federal bankruptcy case. App. 20a. That assertion is manifestly incorrect, and goes to the very heart of the matter. No one disputes that there are limits on a federal court's power to enjoin a state-court proceeding. *See, e.g.*, 11 U.S.C. § 105(a); 28 U.S.C. § 2283; *Younger*, 401 U.S. at 43-55. But those limits are *substantive*, not *jurisdictional*, in nature. There are a variety of reasons why a federal court may not be able to enjoin a state proceeding as a remedy in a federal case, but lack of subject-matter jurisdiction over the state proceeding is not among them. Accordingly, a federal court asked to enjoin a state proceeding as a remedy in a federal case should focus on the relevant substantive limitations, not its subject-matter jurisdiction. That means, in the context of this case, that the Third Circuit erred by focusing on whether the Montana state-court actions are "related to" the Grace bankruptcy within the meaning of 28 U.S.C. § 1334(b) rather than whether the bankruptcy court had the substantive power to enjoin prosecution of those actions under 11 U.S.C. § 105(a).[2]

Indeed, the Third Circuit's characterization of the issue in this case as jurisdictional cannot be squared with this Court's decision in *Syngenta*. The issue

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[2] Because § 105(a) is an "Act of Congress" that "expressly authorize[s]" a bankruptcy court to grant necessary or appropriate injunctive relief, the Anti-Injunction Act by its terms poses no bar to injunctive relief under these circumstances. 28 U.S.C. § 2283; *see generally In re Parker*, 499 F.3d 616, 627 (6th Cir. 2007) (collecting cases).

there was whether a litigant could remove a state-court action to federal court under the All Writs Act, 28 U.S.C. § 1651, on the ground that the action violated a settlement agreement subject to the federal court's ongoing jurisdiction. *See Syngenta*, 537 U.S. at 30-31. This Court held that the state-court action was beyond federal jurisdiction, and that the All Writs Act did not extend that jurisdiction, but noted that the federal court could nonetheless enjoin the state court action in the exercise of its remedial power in the federal action. *See id.* at 32-34 & n.*. *Syngenta*, in other words, stands for the very proposition that the Third Circuit rejected below: that a federal court can enjoin a state proceeding concededly beyond its subject-matter jurisdiction. If an injunction required the exercise of federal subject-matter jurisdiction over the state proceeding sought to be enjoined, then *Syngenta* would make no sense.[3]

The Third Circuit insisted, however, that its contrary approach "finds support" in this Court's decision in *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995). App. 20a. This Court there rejected the

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[3] The Third Circuit purported to distinguish *Syngenta* in a footnote, asserting that the case stands only for the proposition that "an injunction may be permissible if the enjoined action is an attempt to collaterally attack a judgment in an earlier case over which the federal court undeniably has subject matter jurisdiction." App. 21-22a n.11. But that is a distinction without a difference. As noted in the text, the point of *Syngenta* is that a federal court's injunctive powers are not limited by its subject-matter jurisdiction. Whether a federal court has the substantive power to issue an injunction in a particular case is an entirely different matter, and depends on whether such an injunction is necessary to vindicate a federal judgment or right.

argument that a bankruptcy court lacked "jurisdiction to issue [a] Section 105 Injunction" preventing a creditor from executing on a supersedeas bond posted by the debtor. 514 U.S. at 307. That argument fails on its own terms, this Court held, because the creditor's proceeding to execute on the bond was at least "related to" the bankruptcy within the meaning of § 1334(b). *See id.* at 309-11.

The Third Circuit inferred from *Celotex* that a bankruptcy court's remedial powers are limited by its subject-matter jurisdiction. According to the Third Circuit:

> If it were the case that a bankruptcy court's jurisdiction over an adversary proceeding was sufficient in and of itself to give it jurisdiction to enjoin third parties, as Grace and Montana now contend, the Supreme Court's entire analysis of related-to jurisdiction in *Celotex* would have been superfluous. Clearly it was not.

App. 21a (citing *Celotex*, 514 U.S. at 307). That negative inference, however, is unwarranted. The *Celotex* Court noted that it was simply resolving the jurisdictional dispute as framed by the parties there. *See* 514 U.S. at 307 (noting that the parties differed as to whether the creditor's proceeding to execute on the debtor's bond was "related to" the bankruptcy). The *Celotex* Court expressly *declined* to decide whether the bankruptcy court's subject-matter jurisdiction over the bankruptcy proceeding satisfied any jurisdictional requirement. *See id.* at 311 n.8 (citing *Monroe Well*, 67 B.R. at 753). Needless to say,

Celotex cannot be deemed to have resolved an issue that it expressly declined to address.[4]

If anything, *Celotex* underscores the endemic confusion engendered by the word "jurisdiction." Although the parties framed the dispute in *Celotex* in terms of subject-matter jurisdiction under 28 U.S.C. § 1334(b), it was really a dispute over the extent of a bankruptcy court's substantive power under 11 U.S.C. § 105(a). Indeed, this Court granted certiorari in *Celotex* to resolve "the conflict between the Fifth Circuit's decision in this case and the Fourth Circuit's decision" in *Willis v. Celotex Corp.*, 978 F.2d 146 (1992). 514 U.S. at 306. The nub of that conflict, however, involved the extent of the bankruptcy court's substantive power under § 105(a), not its subject-matter jurisdiction under § 1334(b). *Compare Willis*, 978 F.2d at 150 ("[T]he bankruptcy court did not act improperly in enjoining execution on supersedeas bonds posted to secure judgments against Celotex under § 105(a).") *with Edwards v. Armstrong World Indus., Inc.*, 6 F.3d 312, 320 (5th Cir. 1993) ("Whatever the ultimate scope of section 105, it does not extend so far as to give the

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[4] This Court also skirted, but did not decide, this issue in *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195 (2009). The Second Circuit there held that a bankruptcy court lacked subject-matter jurisdiction under 28 U.S.C. § 1334(b) to enjoin certain state court lawsuits against non-debtors. *See In re Johns-Manville Corp.*, 517 F.3d 52, 60-65 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2195 (2009). This Court reversed without reaching the jurisdictional issue, holding instead that the issue had been conclusively resolved in an earlier proceeding, and that this conclusive resolution could not be collaterally attacked in subsequent litigation. *See* 129 S. Ct. at 2205-06.

bankruptcy court authority over a supersedeas bond in which the debtor has no interest."), *rev'd*, 514 U.S. 300 (1995). The dispute in *Celotex* over a court's "jurisdiction to issue [a] Section 105 Injunction," 514 U.S. at 307, thus, was not really a dispute over the court's subject-matter jurisdiction at all; rather, it was a dispute over the court's substantive power to grant relief in a case within its subject-matter jurisdiction.

As this Court has explained, "'[j]urisdiction' ... is a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (internal quotation omitted). It is thus "commonplace" for courts, including this Court, to use the word "jurisdiction" loosely to refer to a court's substantive authority as well as to its subject-matter jurisdiction, *i.e.*, its "statutory or constitutional power to adjudicate the case." *Id.* at 89-90 (emphasis omitted); *see also Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243 (2010) ("'Jurisdiction' refers to 'a court's adjudicatory authority.'") (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)). This Court, however, has "evinced a marked desire" to curtail the imprecise and overly expansive characterization of non-jurisdictional limits on a court's substantive authority as jurisdictional. *Reed Elsevier*, 130 S. Ct. at 1244. Indeed, this Court has granted certiorari frequently in recent Terms to address this very issue. *See id.*; *Dolan v. United States*, No. 09-367, __ U.S. __, slip op. 3-5 (June 14, 2010); *Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 130 S. Ct. 584, 596-97 (2009); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134-36 (2008); *Bowles v. Russell*, 551 U.S. 205, 211 (2007); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510-16 (2006); *Eberhart v.*

United States, 546 U.S. 12, 15-16 (2005) (*per curiam*); *Scarborough v. Principi*, 541 U.S. 401, 412-14 (2004); *Kontrick*, 540 U.S. at 454-55.

By framing the scope of a federal court's injunctive powers in jurisdictional terms, the Third Circuit also exacerbated a circuit conflict on this issue. The Fifth Circuit, like the Third Circuit, holds that a federal court cannot enjoin a state proceeding as a remedy in a federal case without exercising subject-matter jurisdiction over the state proceeding. *See In re Zale Corp.*, 62 F.3d 746, 751-52 (5th Cir. 1995); *see also In re Prescription Home Health Care, Inc.*, 316 F.3d 542, 547-50 (5th Cir. 2002) (analyzing bankruptcy court's power to enjoin proceedings against nondebtors by reference to the bankruptcy court's subject-matter jurisdiction over such proceedings). In sharp contrast, other circuits have upheld injunctions of state proceedings (including criminal and administrative proceedings) over which the federal court could not possibly have exercised subject-matter jurisdiction. *See, e.g.*, *Jaskolski v. Daniels*, 427 F.3d 456, 459-60 (7th Cir. 2005) (upholding injunction of state malicious prosecution action beyond federal jurisdiction); *Entergy, Ark., Inc. v. Nebraska*, 210 F.3d 887, 900 (8th Cir. 2000) (upholding injunction of state administrative proceeding beyond federal jurisdiction); *Gilliam v. Foster*, 61 F.3d 1070, 1083 & n.11 (4th Cir. 1995) (*en banc*) (upholding injunction of state criminal proceeding beyond federal jurisdiction); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 538-41 (9th Cir. 1994) (same). And, in the specific context presented here, other circuits have analyzed the propriety of a § 105(a) injunction without reference to the red-herring issue of subject-matter jurisdiction

over the proceedings sought to be enjoined. *See, e.g.*, *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1093-1100 (9th Cir. 2007); *In re Dow Corning Corp.*, 280 F.3d 648, 656-57 (6th Cir. 2002).

Indeed, the Third Circuit itself (in a decision joined by then-Judge Alito) previously held that a federal court could enjoin a state proceeding as a remedy in a federal case even where the federal court concededly could not exercise subject-matter jurisdiction over that proceeding. *See In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 314 F.3d 99, 103 (3d Cir. 2002) ("The injunction was issued under the federal court's jurisdiction ..., which it had *whether or not the state claims were removed*.") (emphasis added); *see also Gerard*, 115 Fed. App'x at 568 ("[T]he issue of bankruptcy court jurisdiction to entertain the motion relating to the Injunction was in reality a non-issue.").

In effect, the decision below amends the Anti-Injunction Act to prohibit federal injunctions of state proceedings over which the federal courts could not independently exercise subject-matter jurisdiction, even if such an injunction would otherwise fall within an exception to that Act. Needless to say, the Third Circuit has no such power to rewrite the statute, and thereby fundamentally to alter the relationship between federal and state courts. As this Court has explained, the careful exceptions to the Anti-Injunction Act "are designed to ensure the effectiveness and supremacy of federal law." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988). This is an especially important and recurring issue in the bankruptcy context, where debtors often seek temporarily to enjoin certain state-court proceedings

against non-debtors that could affect the debtor's ability to reorganize. *See, e.g.*, Brubaker, *Nondebtor Releases*, 72 Am. Bankr. L.J. at 8 ("A temporary nondebtor stay complements the Code's automatic stay provisions and is widely accepted as a legitimate exercise of the bankruptcy court's equitable powers."). By imposing a drastic limitation on federal remedial power over and above the substantive limitations set forth in the Anti-Injunction Act, the decision below sows confusion in the law and improperly curtails the federal courts' ability to vindicate federal rights.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

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June 18, 2010

APPENDIX

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 08-3697/3720

In re: W. R. GRACE & CO, *et al.*,
Debtor

W. R. Grace & Co., *et. al.*,

v.

Margaret Chakarian; John Does 1-1000;
Home Saving Termite Control;
Abner Defendants; Carol Gerard; Keri Evans,

State of Montana,
Appellant in 08-3697

W. R. Grace & Co.,
Appellant in 08-3720.

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 08-cv-246)
District Judge: Honorable Ronald L. Buckwalter

Argued September 21, 2009

Before: BARRY, FISHER and JORDAN,
Circuit Judges.

(Filed: December 31, 2009)

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OPINION OF THE COURT

JORDAN, *Circuit Judge*.

W. R. Grace & Co. ("Grace") and the State of Montana appeal an order from the United States District Court for the District of Delaware affirming an order from the District's Bankruptcy Court denying Grace's motion to expand a preliminary injunction. The proposed expansion would have enjoined claims against the State of Montana arising from Grace's mining operations near Libby, Montana. Both the District Court and the Bankruptcy Court determined that the Bankruptcy Court lacked jurisdiction under 28 U.S.C. §§ 1334(b) and 157(a) to expand the injunction to enjoin those claims and, therefore, denied the motion. For the following reasons, we will affirm.

I. Background

This appeal is the fourth to reach us from Grace's ongoing efforts to reorganize under Chapter 11 of the Bankruptcy Code, efforts which began in 2001 when

Grace sought shelter from liabilities associated with asbestos litigation.[1] Disputes in the case have been aggressively litigated, as our previous three opinions indicate. *See In re W. R. Grace & Co.*, 316 F. App'x 134 (3d Cir. 2009); *In re W. R. Grace & Co.*, 115 F. App'x 565 (3d Cir. 2004); *In re Kensington Int'l Ltd.* 368 F.3d 289 (3d Cir. 2004). Grace produces specialty chemicals and materials. As part of its business, from 1963 until 1990, Grace operated a vermiculite mine ten miles north of Libby, Montana. The mine yielded ore which was used to create zonolite. The zonolite contained tremolite, which is alleged to be an especially carcinogenic variety of asbestos. While the mine was operating, it generated tremolite-laden dust that allegedly caused injury to mine workers, their families, and others in the community.

Persons claiming to be injured by that asbestos exposure (the "Libby Claimants")[2] filed suit against Grace in Maryland state court (the "Lawsuit"). As a result of costs associated with such asbestos litigation, Grace decided to file a petition for relief under Chapter 11 of the Bankruptcy Code.

A. *Preliminary Injunctive Relief*

On April 2, 2001, the same day that Grace filed its Chapter 11 petition, it commenced an adversary proceeding to halt prosecution of the Lawsuit. The Bankruptcy Court promptly granted a temporary

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[1] At the time of the filing, the debtors consisted of 62 separate entities. For ease of reference, we will refer to the debtors collectively as "Grace."

[2] We follow nomenclature adopted in earlier proceedings by referring to the various plaintiffs as the "Libby Claimants."

restraining order that included a provision enjoining litigation against Grace and its non-debtor affiliates whose purported asbestos liability derived from Grace's alleged liability. On May 3, 2001, the Bankruptcy Court entered a preliminary injunction pursuant to 11 U.S.C. § 105(a), encompassing the conditions of the temporary restraining order.

More specifically, it precluded "All Asbestos-Related and Fraudulent Transfer Claims" against affiliated entities, including claims "against Insurance Carriers alleging coverage from asbestos-related liabilities." (App. at 180-81.) At Grace's request, the May 3rd order named Grace's worker's compensation insurer, Maryland Casualty Company ("MCC"), as an insurance carrier covered by the injunction. The request was based in part on a 1991 Settlement Agreement between Grace and MCC in which Grace agreed to release and indemnify MCC against any future asbestos-related claims against MCC that arose out of Grace's alleged liability. On January 22, 2002, the Bankruptcy Court modified the scope of the preliminary injunction to include "several additional claims and parties and to reinstate the bar against the commencement" of new actions against affiliates directly or indirectly related to Grace's alleged asbestos liability. (App. at 185.)

On February 4, 2002, a group of the Libby Claimants, led by named plaintiff Carol Gerard, sought to modify the preliminary injunction to allow them to pursue claims against MCC. The Bankruptcy Court denied the motion, which, despite a reversal by the District Court, was ultimately affirmed by our Court on appeal. *See In re W. R.*

Grace & Co. (Gerard v. W.R. Grace & Co.), 115 F. App'x 565 (3d Cir. 2004) ("Gerard").

B. *Present Litigation*

Prior to Grace's April 2, 2001 filing for bankruptcy, the Libby Claimants brought lawsuits in the Montana courts against the State of Montana (the "Montana Actions"), alleging that Montana is liable to them because it was negligent in failing to warn them of the risks of asbestos from the Libby mine. On December 14, 2004, the Montana Supreme Court held that Montana had a duty to "gather public health-related information and provide it to the people." *Orr v. State*, 106 P.3d 100, 107 (Mont. 2004); *see also id.* at 110 ("The State's argument that it owed no duty to the Miners[3] ignores the State's [duty to] make investigations, disseminate information, and make recommendations for control of diseases and improvement of public health to persons, groups, or the public." (citations omitted)). Having established that, under Montana law, the State of Montana owed a duty to the Libby Claimants, the Montana Supreme Court remanded for a "determination by the fact-finder of whether the State breached its duty to the Miners, and if so, whether such breach caused the damages claimed by them." *Id.* at 118.

On June 9, 2005, understandably reluctant to face potential asbestos liability alone, Montana

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[3] The Montana Supreme Court used the term "Miners" to refer collectively to all of the plaintiffs in the suit before it, including "an on-site carpenter, seven former miners from Libby, Montana, and the wife of a former miner, all of whom have been diagnosed with asbestos disease." *Orr v. State*, 106 P.3d 100, 102 (Mont. 2004).

asked the Bankruptcy Court for relief from the automatic stay of litigation against Grace so that it could implead Grace as a third-party defendant in the Montana Actions.[4] Grace opposed that motion, but filed its own motion asking the Bankruptcy Court to expand the preliminary injunction to include actions brought against the State of Montana. Grace argued that its motion should be granted because Grace and Montana share an identity of interests such that the Montana Actions were essentially suits against Grace, which would be harmful to Grace's efforts to reorganize. The Libby Claimants, of course, opposed Grace's motion, claiming that the Bankruptcy Court lacked jurisdiction to enjoin the Montana Actions. They also argued that, even if the Court did have jurisdiction, Grace's motion failed to establish the unusual circumstances or equitable factors required for the issuance of an injunction against a third-party litigant. The State of Montana also filed a response to Grace's motion, in which it stated that it did not object to the motion unless the relief granted would affect certain of its rights. After a hearing on the motions, the Bankruptcy Court stayed the Montana Actions and took the matter under advisement.

On April 16, 2007, the Bankruptcy Court denied Grace's motion to expand the preliminary injunction to encompass the Montana Actions, holding that it lacked subject matter jurisdiction to grant the

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[4] Pursuant to 11 U.S.C. § 362(a), the filing of a petition such as Grace's results in an automatic stay, applicable to all entities, of "judicial, administrative, or other action or proceeding against the debtor ... ." 11 U.S.C. § 362(a)(1).

requested relief. *See In re W.R. Grace & Co.*, 366 B.R. 295, 301 (Bankr. D. Del. 2007). After examining 28 U.S.C. §§ 1334(b) and 157(a), and controlling precedent, the Bankruptcy Court concluded that it did not have "related-to" subject matter jurisdiction over the Montana Actions because Grace's bankruptcy estate would not be directly affected by the outcome of those lawsuits. *Id.* The Court noted that, before there could be any effect on Grace, "Montana must first be found liable in state court and then pursue its claim for indemnification in bankruptcy court." *Id.*

> While the [Montana Supreme Court] found that a duty existed on behalf of the State, the case was remanded for determination of whether the State of Montana breached that duty. If breach is not found, indemnification/contribution is not possible. If breach is found, the Montana Plaintiffs would still be obligated to bring an entirely separate proceeding to receive indemnification. Montana law prohibits the State of Montana from litigating ... against Debtors for either contribution or indemnity during the course of the State Court Actions. A judgment against the State of Montana will not bind Debtors. An intervening adjudication is necessary to affect the estate.

Id. (citations omitted). The Court effectively denied Montana's motion to lift the automatic stay, saying that "the automatic stay remains in effect as to the Debtors and their property ... and nothing in this

Opinion and Order authorizes relief from the stay as to any allegation ... ."[5] *Id.* at 302.

The State of Montana and Grace sought leave to appeal, and the District Court allowed them to do so, though it went on to affirm the decision of the Bankruptcy Court.[6] *See In re W.R. Grace & Co.*, No. 08-246, 2008 WL 3522453 (D. Del. Aug. 12, 2008). Like the Bankruptcy Court, the District Court noted that Grace "will not be bound by a judgment against the State of Montana in the state court actions [because] a separate adjudication is necessary to affect Debtors' estate." *Id.* at *4. The Court thus held that "related-to subject matter jurisdiction does not exist." *Id.* at *6.

Grace and Montana filed timely notices of appeal to our Court.

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[5] While the Bankruptcy Court did not formally deny the State of Montana's motion for relief from the automatic stay, the above-quoted language makes it clear that Montana's motion was not granted, and that the automatic stay remained in place.

[6] Before seeking leave 6 to file their interlocutory appeal, Montana and Grace filed motions for reconsideration, to which the Libby Claimants responded with objections. The Bankruptcy Court denied the motions and again held that it did not have subject matter jurisdiction over the Montana Actions. Grace then filed a motion for leave to file an interlocutory appeal from the Bankruptcy Court's order denying expansion of the preliminary injunction. The State of Montana joined in the motion, while the Libby Claimants filed an opposition to it. All of the parties filed briefs regarding the underlying appeal in anticipation of the District Court's ruling on the merits if it chose to hear the appeal.

II. Discussion[7]

On appeal, Grace and Montana argue that the Bankruptcy and District Courts erred because "a federal court need not exercise subject-matter jurisdiction over a state-court action in order to enjoin it." (Grace's Op. Br. at 12).[8] According to Appellants, "[as] long as the federal court is acting in a case over which it has subject-matter jurisdiction, the propriety of an injunction is a matter of the federal court's remedial authority, not its subject-matter jurisdiction." (*Id.*) While the Appellants recognize that a "bankruptcy court must establish subject matter jurisdiction before considering the merits of a § 105(a) injunction" (*Id.* at 21 (internal quotation marks and citation omitted)), they rely on our non-precedential opinion in *Gerard* to argue that this requirement "does not mean that the court must establish jurisdiction over the proceeding sought to

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[7] The Bankruptcy Court had jurisdiction over Grace's Chapter 11 proceedings pursuant to 28 U.S.C. §§ 1334(b) and 157(a), and the District Court exercised appellate jurisdiction over the Bankruptcy Court decision under 28 U.S.C. § 158(a). We have appellate jurisdiction under 28 U.S.C. § 1292(a)(1). We exercise the same standard of review as the District Court, which reviewed the Bankruptcy Court's legal determinations *de novo*, and its factual findings for clear error. *In re Am. Pad & Paper Co.*, 478 F.3d 546, 551 (3d Cir. 2007). Whether subject matter jurisdiction exists is a question of law, and thus our standard of review is *de novo*. *Shaffer v. GTE N., Inc.*, 284 F.3d 500, 502 (3d Cir. 2002).

[8] While the language is from Grace's brief, the argument is also the State of Montana's. (*See* State of Montana's Op. Br. at 20 ("Because the Bankruptcy Court would not have to exercise jurisdiction over the Montana Actions to grant Grace's requested relief, the Bankruptcy Court need not have 'related to' jurisdiction over *those actions*.").)

be enjoined." (*Id.*) The Libby Claimants respond that the Bankruptcy Court must have subject matter jurisdiction over the Montana Actions to enjoin them, and that the lower courts correctly found that the Bankruptcy Court was without such jurisdiction. They further argue that, should we conclude that jurisdiction exists, a § 105(a) injunction is nevertheless not warranted because Grace and Montana have failed to establish the unusual circumstances or equitable factors required for the issuance of an injunction.

A. *Bankruptcy Subject Matter Jurisdiction Generally*

While § 105(a) of the Bankruptcy Code allows a bankruptcy court to issue any order necessary to carry out the provisions of the Code, it "does not provide an independent source of federal subject matter jurisdiction." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 225 (3d Cir. 2004); *see also* 11 U.S.C. § 105(a). Thus, before considering the merits of any § 105(a) injunction, a bankruptcy court must establish that it has subject matter jurisdiction to enter the injunction. *See Combustion Eng'g*, 391 F.3d at 225 n.35 (describing the bankruptcy court's "threshold jurisdictional inquiry").

Federal district courts "have original jurisdiction but not exclusive jurisdiction of all civil proceedings arising under title 11 [of the Bankruptcy Code], or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). Section 157(a) of title 28 then permits a district court to refer "any and all proceedings arising under title 11 or arising in or related to a case under title 11" to the bankruptcy judges within the district. *Id.* § 157(a). There are

thus three types of bankruptcy jurisdiction, commonly called "arising under," "arising in," and "related to" jurisdiction. Only the last of these is at issue here. Proceedings over which a bankruptcy court can legitimately exercise related-to jurisdiction include "suits between third parties that conceivably may have an effect on the bankruptcy estate." *Combustion Eng'g*, 391 F.3d at 226 (citing *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.5 (1995)). Broadly worded as that is, however, related-to jurisdiction "is not without limitation." *Id.* at 228; *see also Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 40 (1991) (noting the "limited authority" Congress has vested in the bankruptcy courts through related-to jurisdiction).

B. *Related-to Jurisdiction*

To understand the limits of related-to jurisdiction, it is helpful to look at the case in which we adopted the "any conceivable effect" test for finding such jurisdiction. In *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), we said,

> The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the *outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*. ... An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate.

Id. at 994 (emphasis in original; citations omitted) (overruled on other grounds); *see also Combustion Eng'g*, 391 F.3d at 226 (describing the *Pacor* test as "seminal"). Despite that sweeping language, the facts of the case demonstrated a crucial limit on the legitimate exercise of subject matter jurisdiction.

In *Pacor*, John and Louise Higgins brought suit in Pennsylvania state court against Pacor, a distributor of chemical supplies, seeking damages from injuries allegedly resulting from Mr. Higgins's work-related exposure to asbestos supplied by Pacor. 743 F.2d at 986. Thereafter, Pacor filed a third-party complaint impleading the Johns-Manville Corporation ("Manville"), which Pacor claimed was the original manufacturer of the asbestos. *Id.* Soon after, Manville filed a Chapter 11 bankruptcy petition. *Id.* When Pacor attempted to remove the Higgins lawsuit to the bankruptcy court where the Manville bankruptcy was pending, we denied removal, holding that "the primary action between Higgins and Pacor would have no effect on the Manville bankruptcy estate, and therefore [cannot establish] 'related to' [jurisdiction over that suit] ... ." *Id.* at 995. We noted that, "[a]t best, [the Higgins-Pacor lawsuit] is a mere precursor to the potential third party claim for indemnification by Pacor against Manville. Yet the outcome of the Higgins-Pacor action would in no way bind Manville, in that it could not determine any rights, liabilities, or course of action of the debtor." *Id.* Thus, in *Pacor*, we were clear that an inchoate claim of common law indemnity is not, in and of itself, enough to establish the bankruptcy court's subject matter jurisdiction. *See id.* ("[A]ny judgment received by the plaintiff Higgins could not itself result in even a contingent claim against Manville,

since Pacor would still be obligated to bring an entirely separate proceeding to receive indemnification.").

Eighteen years later, in *In re Federal-Mogul Global, Inc.*, 300 F.3d 368 (3d Cir. 2002), we reaffirmed the *Pacor* test and simultaneously reiterated that a potential indemnification claim under common law is not enough to establish a bankruptcy court's subject matter jurisdiction. We stated that "[t]he test articulated in *Pacor* for whether a lawsuit could 'conceivably' have an effect on the bankruptcy proceeding inquires whether the allegedly related lawsuit would affect the bankruptcy proceeding *without the intervention of yet another lawsuit*." *Id.* at 382 (emphasis added). Applying that rule, we held that the bankruptcy court did not have related-to subject matter jurisdiction because the indemnification claim against the debtors had "not yet accrued and would require another lawsuit before [having] an impact on [the debtor's] bankruptcy proceeding." *Id.* Thus, *Federal-Mogul* made it clear that there is no related-to jurisdiction over a third-party claim if there would need to be another lawsuit before the third-party claim could have any impact on the bankruptcy proceedings.

Finally, and more recently, in *Combustion Engineering*, we again emphasized the bounds of the *Pacor* test for related-to jurisdiction. *See* 391 F.3d at 190. There, we considered a prepackaged Chapter 11 reorganization plan providing that all asbestos claims against Combustion Engineering and two of its non-debtor affiliates, ABB Lummus Global, Inc. and Basic, Inc. ("Lummus" and "Basic"), were to be channeled through a postconfirmation trust created

under § 524(g) of the Bankruptcy Code, to which all three entities were to contribute. *Id.* at 201. The plan also provided for a § 105(a) injunction barring any asbestos-related claims against the three entities. *Id.* One of the issues on appeal was whether the bankruptcy court had the power to enter the injunction as to non-debtors Lummus and Basic. In analyzing that question, we repeated that the *Pacor* test, as clarified by *Federal-Mogul*, requires an inquiry into "whether the allegedly related lawsuit would affect the bankruptcy without the intervention of yet another lawsuit." *Id.* at 227. We also examined other factors advanced by the debtor as grounds for related-to jurisdiction, namely, the alleged unity of interest between the debtor and its affiliates based on the debtor's potential indemnity obligation to those affiliates, as well as the existence of both a shared production site and shared insurance between the debtor and the affiliates. *Id.* at 230. Even when considering those additional elements of unity between Combustion Engineering and its non-debtor affiliates, we nevertheless held that related-to jurisdiction could not be extended to asbestos claims against those non-debtors.

> [A] review of the asbestos-related claims asserted against Combustion Engineering, Basic and Lummus reveals little evidence of derivative liability ... . [W]e have rejected "related to" jurisdiction over third-party claims involving asbestos or asbestos-containing products supplied by the debtor when the third-party claim did not directly result in liability for the debtor ... . [A]ny indemnification claims against Combustion Engineering ... would

> require the intervention of another lawsuit to affect the bankruptcy estate, and thus cannot provide a basis for "related to" jurisdiction.

Id. at 231-32.

Turning to the facts at hand, the relationship between Grace and the State of Montana is in one crucial respect analogous to the relationships in *Pacor*, *Federal-Mogul*, and *Combustion Engineering*. Like the debtors in those cases, Grace will not be bound by any judgment against the third party in question. Rather, an entirely separate action would be necessary for any liability incurred by Montana to have an impact on Grace's estate. Specifically, Montana would first have to be found liable by its state courts and would then have to successfully bring an indemnification or contribution claim against Grace in the Bankruptcy Court. This is precisely the situation in which we have found that related-to jurisdiction does not exist. Indeed, we have stated and restated that, in order for a bankruptcy court to have related-to jurisdiction to enjoin a lawsuit, that lawsuit must "affect the bankruptcy [] without the intervention of yet another lawsuit." *Federal-Mogul*, 300 F.3d at 382; *Combustion Eng'g*, 391 F.3d at 232.

The Appellants' "unity of interest" argument does not further their cause. In *Combustion Engineering*, we not only repeated that a non-debtor's potential right of contribution was not enough to establish related-to jurisdiction, we also rejected the idea that shared insurance or a common production site was "a sufficient basis for the kind of unity of interest that

could give rise to related to jurisdiction." *Id.* at 232 (quotations omitted).

Here, Montana, of course, is not even a private entity, let alone an entity in the business, as Grace was, of producing asbestos products. Instead, Montana's potential liability is based on an independent legal duty that Montana's Supreme Court has decided that the State, as sovereign, owes to its people, namely, a governmental duty to warn about hazards at Grace's site. *Orr*, 106 P.3d at 108.

In short, our recently reaffirmed precedent dictates that a bankruptcy court lacks subject matter jurisdiction over a third-party action if the only way in which that third-party action could have an impact on the debtor's estate is through the intervention of yet another lawsuit. Here, we are presented with state court actions that have only the potential to give rise to a separate lawsuit seeking indemnification from the debtor. Accordingly, we must affirm the Bankruptcy and District Courts' conclusion that subject matter jurisdiction does not exist for the purpose of expanding the § 105(a) injunction to preclude the Montana Actions.

C. *Appellants' Alternative Theories to Support Injunctive Relief*

Grace and Montana seem to read our non-precedential decision in *Gerard* to be contrary to the above-described precedent, but they are misguided. *Gerard* is factually distinguishable because it involved an injunction that was already in place as to MCC, and thus the issue in that case was "whether [we] should modify an injunction already entered in the Bankruptcy Court in favor of Grace and MCC." 115 F. App'x at 567. Here, Grace is seeking to

expand the § 105(a) injunction to shelter Montana, a party not already subject to the injunction, against claims that are not akin to anything like the insurance indemnities at issue in *Gerard*. As the District Court noted, "[h]ad the Libby Claimants sought to modify an injunction already issued under section 105(a) as to the State of Montana, the analysis may have been different. However, [here, we are] assessing whether to expand an injunction to include additional parties ... ." *See In re W.R. Grace & Co.*, 2008 WL 3522453, at *4. In other words, unlike *Gerard*, in which the issue was whether to limit an injunction that had already been entered, the issue here is whether the Bankruptcy Court has jurisdiction to enjoin entirely new claims against an entirely new party.

It bears re-emphasis that MCC and Grace were parties to a contract in which Grace had agreed to indemnify MCC against any future asbestos-related claims filed against MCC that arose out of Grace's asbestos liability. *Gerard*, 115 F. App'x at 568. Thus, MCC had a clear contractual right to indemnity, which may have presented a more direct threat to Grace's reorganization.[9] In the present case, by contrast, Montana has only a "potential common law indemnification claim against Debtors

[9] Although this may have been a more direct threat to the bankruptcy estate—and we have not excavated the *Gerard* record to examine that—we do not mean to imply that contractual indemnity rights are in themselves sufficient to bring a dispute over that indemnity within the ambit of related-to jurisdiction. What will or will not be sufficiently related to a bankruptcy to warrant the exercise of subject matter jurisdiction is a matter that must be developed on a fact-specific, case-by-case basis.

pending the outcome of the state action, which falls far short of direct or automatic liability ... ." *In re W.R. Grace & Co.*, 2008 WL 3522453, at *5.

Also, contrary to what Appellants argue, *Gerard* is not the law of the case. At the most basic level, *Gerard* did not involve the same parties and issues,[10] as is required for application of the law of the case doctrine. *See Pub. Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116 (3d Cir. 1997) ("The law of the case doctrine directs courts to refrain from re-deciding issues that were resolved earlier in the litigation.") In addition, our decision in *Combustion Engineering* was rendered after *Gerard* and thus constitutes supervening legal authority. *Id.* (recognizing that "supervening new law" is an exception to the law of the case doctrine); *cf. Baca v. King*, 92 F.3d 1031, 1035 (10th Cir. 1996) (holding that the law of the case doctrine "is not a fixed rule that prevents a federal court from determining the question of its own subject matter jurisdiction in a given case"). Therefore, *Gerard* is not the law of the case, and, in any event, is plainly distinguishable.

Further, to the extent that Grace and Montana argue that the Bankruptcy Court does not need one of the three statutory foundations of bankruptcy jurisdiction—arising under, arising in, or related-to jurisdiction—to expand the § 105(a) injunction to include the State of Montana, we cannot agree. Specifically, Grace and Montana argue that the

[10] There may be overlap, but there is an obvious distinction between an injunction involving Grace's insurer, MCC, and an injunction covering the sovereign State of Montana with respect to Montana's state-law duties to Montana citizens.

Bankruptcy Court does not need related-to jurisdiction over the Montana Actions in order to enjoin them, because the Court's jurisdiction over the adversary proceeding in Grace's Chapter 11 case is sufficient to provide it with a basis for expanding the § 105(a) injunction. (*See* Grace's Op. Br. at 17 ("[A] bankruptcy court has subject-matter jurisdiction to adjudicate a motion in an adversary proceeding initiated by a debtor in its own bankruptcy case, regardless of the subject matter of that motion.").) If we were to accept Grace and Montana's position, however, a bankruptcy court would have power to enjoin any action, no matter how unrelated to the underlying bankruptcy it may be, so long as the injunction motion was filed in the adversary proceeding. That notion stands in stark contrast to the basic premise that "federal courts are courts of limited jurisdiction; they exercise only the authority conferred on them by Art. III and by congressional enactments pursuant thereto." *Delaware v. Van Arsdall*, 475 U.S. 673, 692 (1986). The existence of a bankruptcy proceeding itself has never been and cannot be an all-purpose grant of jurisdiction.

Our conclusion finds support in the Supreme Court's decision in *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995). There, the Supreme Court was asked to determine whether a bankruptcy court had jurisdiction to issue a § 105(a) injunction that had the effect of enjoining an action pending in a district court in another judicial district. *Id.* at 305. Rather than assuming that the bankruptcy court's jurisdiction over the adversary proceeding provided it with the necessary jurisdiction to issue the injunction, the Supreme Court observed that bankruptcy court jurisdiction "is grounded in, and

limited by, statute." *Id.* at 307. Thus, it explained, the bankruptcy court's jurisdiction to enjoin the other proceeding must be based on the "arising under, arising in, or related to language of §§ 1334(b) and 157(a)." *Id.* (quotation marks omitted). After reviewing several circuit court opinions, including our decision in *Pacor*, the Supreme Court concluded that the bankruptcy court had jurisdiction to issue the injunction, but only because the proceeding was "related to" Celotex's bankruptcy under the *Pacor* test. *Id.* at 308-10. If it were the case that a bankruptcy court's jurisdiction over an adversary proceeding was sufficient in and of itself to give it jurisdiction to enjoin third parties, as Grace and Montana now contend, the Supreme Court's entire analysis of related-to jurisdiction in *Celotex* would have been superfluous. Clearly it was not. The Supreme Court undertook the analysis it did because a bankruptcy court may not enjoin proceedings between third parties unless those proceedings arise in or under or are related to the underlying bankruptcy.[11] *Id.* at 307.

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[11] Grace and Montana say, "it is well-settled that a federal court may enjoin a state-court action without exercising subject-matter jurisdiction over that action" (Grace's Op. Br. at 14; *see also* State of Montana's Op. Br. at 20), but the authority they cite—dicta from a Supreme Court case and a case from our circuit—does not support their contention. *See Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 34 n.* (2002); and *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 314 F.3d 99, 103 (3d Cir. 2002). In *Syngenta*, the Supreme Court suggested in a footnote that a federal court could protect a prior settlement order by issuing an injunction requiring the dismissal of a subsequent, state-court action that was frustrating the order. *Syngenta*, 537 U.S. at 34 n.*. In *Prudential*, we held that an injunction over a state court action

III. Conclusion

In conclusion, our precedent dictates that a federal bankruptcy court does not have related-to jurisdiction over a third-party lawsuit if that lawsuit would affect the bankruptcy proceeding only through the intervention of yet another lawsuit. Grace will not be bound by a judgment against Montana unless there is an additional adjudication. Accordingly, we affirm the judgment of the Bankruptcy Court and the District Court that subject matter jurisdiction does not exist to expand the § 105(a) injunction to include the Montana Actions.

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was appropriate when the state court action interfered with a settlement approved by a federal court. 314 F.3d at 105. Thus, the most that those cases can be read to imply is that an injunction may be permissible if the enjoined action is an attempt to collaterally attack a judgment in an earlier case over which the federal court undeniably has subject matter jurisdiction. Here, the issue is whether the federal bankruptcy court has subject matter jurisdiction in the first place, which it does not. Moreover, *Prudential* was followed two years later by *Combustion Engineering*, where we unequivocally held that in order for a bankruptcy court to have related-to jurisdiction to enjoin a lawsuit, that lawsuit must "affect the bankruptcy without the intervention of yet another lawsuit." 391 F.3d at 232 (citations omitted).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 08-3697/3720

In re: W. R. GRACE & CO, *et al.*,
Debtor

W. R. Grace & Co., *et. al.*,

v.

Margaret Chakarian; John Does 1-1000; Home
Saving Termite Control;
Abner Defendants, Carol Gerard; Keri Evans,

State of Montana,
Appellant in 08-3697

W. R. Grace & Co.,
Appellant in 08-3720.

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 08-cv-246)
District Judge: Honorable Ronald L. Buckwalter

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, and JORDAN, *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT:

/s/ Kent A. Jordan
Circuit Judge

Dated: February 18, 2010
par/cc: J.S.B., Esq.
D.M.B., Esq.
L.B.J., Esq.
C.L., Esq.
J.E.O'N., Esq.
G.L.S., Esq.
S.E.A., Esq.
K.J.M., Esq.
F.A.M., Esq.
C.M.C., Esq.
D.C.C., Esq.
A.G.L., Esq.
K.K.M., Esq.
E.M.L., Esq.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

In re: W. R. GRACE & CO., *et al.*,
Debtors.

W. R. GRACE & CO., *et al.*,
Appellants,

v.

LIBBY CLAIMANTS,
Appellees.

CIVIL ACTION NO. 08-246
BANKRUPTCY CASE NO. 01-1139
ADV. PROC. NO. 01-771

MEMORANDUM

BUCKWALTER, S.J. August 12, 2008

Presently before the Court are Appellants W. R. Grace & Co., *et al.*'s ("Grace" or "Debtors") Motion for Leave to Appeal Order Denying Injunction (Adv. Proc. Docket No. 495) and Appellees Libby Claimants' Opposition (Adv. Proc. Docket No. 505), as well as Appellant State of Montana's Brief on Appeal (Docket No. 10), Appellants Debtors' Brief on Appeal (Docket No. 12), and Appellees Libby Claimants' Brief on Appeal (Docket No. 14). For the reasons set forth below, Appellants Debtors' motion for leave to appeal is granted, and upon consideration of the appeal itself, the Court affirms the Bankruptcy Court's order denying expansion of the preliminary injunction.

I. BACKGROUND[1]

On April 2, 2001, Debtors filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. On the same date, Debtors filed an adversary complaint seeking to stay asbestos-related litigation against various affiliates of Debtors and third parties whose purported asbestos liability was derivative of Debtors' liability. The Bankruptcy Court entered a preliminary injunction barring such actions on May 3, 2001.[2] On January 22, 2002, the Bankruptcy Court modified the scope of the preliminary injunction to include certain additional affiliates and to reinstate the bar against the commencement of new actions against affiliates arising from alleged exposure to asbestos, whether indirectly or directly caused by Debtors.[3]

The Appellees in this matter, referred to as the "Libby Claimants," constitute individuals allegedly injured by exposure to asbestos from Debtors' mining operations in Lincoln County, Montana. On February 4, 2002, certain Libby Claimants sought to modify the preliminary injunction discussed above in order to pursue an alleged direct cause of action against Maryland Casualty Company ("MCC"), one of Debtors' insurers.[4] The Bankruptcy Court denied the Libby Claimants' motion, a decision that was ultimately affirmed by the United States Court of

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[1] The parties are well versed in the facts and procedural history, and therefore the Court lists only those facts necessary to this appeal.

[2] [Adv. Proc. D.I. 32.]

[3] [Adv. Proc. D.I. 87.]

[4] [Adv. Proc. D.I. 85.]

Appeals for the Third Circuit. *In re W.R. Grace & Co. (Gerard v. W. R. Grace & Co.)*, 115 Fed. Appx. 565 (3d Cir. 2004). The Libby Claimants thereafter attempted to pursue their asbestos personal injury claims arising out of Debtors' mining operations in Libby, Montana by commencing suit against Montana Vermiculite Company ("MVC"), the former owners of Debtors' mining operations. On February 25, 2005, the Bankruptcy Court amended the preliminary injunction to stay actions against MVC.[5]

Meanwhile, prior to and after the April 2, 2001 petition date, the Libby Claimants have pursued a number of actions in state court against the State of Montana (the "state court actions"), alleging negligence for failing to warn the Libby Claimants of the risks of asbestos at Debtors' work place and mine in Libby, Montana. On March 25, 2003, the State of Montana filed claims against Debtors in Bankruptcy Court, seeking contribution and indemnification in the pending state court actions.

On August 22, 2005, Debtors filed a motion in Bankruptcy Court seeking to expand the preliminary injunction ("injunction motion") to include the state court actions filed against the State of Montana.[6] The Libby Claimants filed an opposition to Debtors' injunction motion,[7] joined by the Official Committee of Asbestos Personal Injury Claimants ("PI Committee").[8] The State of Montana filed a response

[5] [Adv. Proc. D.I. 358.]

[6] [Adv. Proc. D.I. 359.]

[7] [Adv. Proc. D.I. 363.]

[8] [Adv. Proc. D.I. 365.]

in which it did not object to the injunction motion unless the relief affected certain of Montana's rights.[9]

The Bankruptcy Court held a hearing on Debtors' injunction motion on December 19, 2005, after which the Bankruptcy Court imposed a temporary stay of the state court actions while the Court considered the matter. On April 16, 2007, the Bankruptcy Court entered an order denying Debtors' injunction motion, finding that "related-to subject matter jurisdiction [did] not exist for the purpose of expanding the injunction to include the state court actions."[10] Debtors and the State of Montana subsequently filed motions for reconsideration,[11] to which the Libby Claimants and the PI Committee filed objections.[12] On May 21, 2007, the Bankruptcy Court held oral arguments and again temporarily stayed the state court actions pending reconsideration. On March 31, 2008, the Bankruptcy Court denied the motions for reconsideration, again finding that the Bankruptcy Court lacked subject matter jurisdiction over the state litigation.[13]

On April 11, 2008, Debtors filed a motion for leave to appeal the Bankruptcy Court's Order denying Debtors' injunction motion, and the State of Montana joined in Grace's motion. The Libby Claimants filed an opposition to the motion. The parties have also filed briefs of the underlying appeal in anticipation of the Court's ruling. Specifically,

[9] [Adv. Proc. D.I. 362.]

[10] [Adv. Proc. D.I. 419 and 420.]

[11] [Adv. Proc. D.I. 427 and 426.]

[12] [Adv. Proc. D.I. 442 and 443.]

[13] [Adv. Proc. D.I. 484 and 485.]

Debtors and the State of Montana contend that the Bankruptcy Court erred in finding that related-to jurisdiction, under 28 U.S.C. § 1334(b), to expand the injunction did not exist.

II. DISCUSSION

A. Leave to Appeal Interlocutory Order

Debtors and the State of Montana seek leave to appeal the Bankruptcy Court's Order denying expansion of the preliminary injunction to include the Libby Claimants' state court actions against the State of Montana. Section 158(a)(3) of Title 28 of the United States Code gives this court jurisdiction to hear appeals, with leave of court, from interlocutory orders and decrees. 28 U.S.C. § 158(a)(3). In deciding whether an interlocutory order is appealable in the bankruptcy context, courts have typically borrowed the standard found in 28 U.S.C. § 1292(b), which governs whether an appeal of an interlocutory order of a district court to a court of appeals is warranted. *In re Edison Bros. Stores, Inc.*, Civ. A. No. 96-177, 1996 WL 363806, at *3 (D. Del., June 27, 1996) (citing *In re Delaware and Hudson Ry. Co.*, 96 B.R. 469, 472-73 (D. Del.), *aff'd*, 884 F.2d 1383 (3d Cir. 1989)). An appellant must establish that "exceptional circumstances justify a departure from the basic policy of postponing review until after the entry of final judgment." *Delaware & Hudson*, 96 B.R. at 473. In addition to the requirement of establishing exceptional circumstance, a court will grant an interlocutory appeal only if the order at issue: (1) involves a controlling question of law as to which there is (2) substantial ground for difference of opinion and (3) when an immediate appeal from the

order may materially advance the ultimate termination of the litigation. *Id.*

Applying the facts and circumstances here, the Court finds an interlocutory appeal of the Bankruptcy Court's order denying expansion of the preliminary injunction to be warranted. In short, the parties' arguments of conflicting legal precedents, combined with the impact of the Bankruptcy Court's Order, satisfy the requirements necessary to justify an immediate appeal. Therefore, the Court grants Debtors' motion for leave to appeal the Bankruptcy Court's Order denying the injunction motion, and will now address the appeal itself.

B. Appeal of Bankruptcy Court Order Denying Debtors' Injunction Motion

At issue is whether the Bankruptcy Court erred in denying expansion of the preliminary injunction to include the state court actions based on a finding that the court lacked related-to subject matter jurisdiction. This Court must accept the Bankruptcy Court's factual determinations unless those determinations are clearly erroneous. *See* Fed. R. Bankr. P. 8013 ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous ... "). The Court reviews the Bankruptcy Court's legal decisions *de novo*. *In re O'Brien Envtl. Energy, Inc.*, 188 F.3d 116, 122 (3d Cir. 1999).

In accordance with 11 U.S.C. § 105(a), a bankruptcy court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code. 11 U.S.C. § 105(a). Section 105(a), however, "does not provide an independent source of federal subject

matter jurisdiction." *In re Combustion Engineering, Inc.*, 391 F.3d 190, 225 (3d Cir. 2004). Therefore, a bankruptcy court must establish subject matter jurisdiction before considering the merits of a § 105(a) injunction.

Pursuant to 28 U.S.C. § 1334(b), "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). The district court may refer "any or all proceedings arising under title 11 or arising in or related to a case under title 11 ... to the bankruptcy judges for the district." 28 U.S.C. § 157(a). Proceedings "related to" a title 11 case include "suits between third parties that conceivably may have an effect on the bankruptcy estate." *Combustion Engineering*, 391 F.3d at 226 (citing *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995)). A bankruptcy court's "related to" jurisdiction, however, is not without limit. *Celotex*, 514 U.S. at 308; *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984).

In *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), the Third Circuit set forth the test for determining "related to" jurisdiction over third-party claims.

> The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*. . . . An action is related to bankruptcy if the outcome could alter the debtor's rights,

> liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

Id. at 994 (emphasis in original and citations omitted). *Pacor* involved a suit brought by John and Louise Higgins against a distributor of chemical supplies (Pacor) for injuries allegedly caused by exposure to asbestos contained in Pacor's products. Pacor thereafter filed a third-party complaint impleading the original asbestos manufacturer, the Johns-Manville Corporation, which subsequently filed for Chapter 11 bankruptcy. In response to Pacor's attempts to remove the Higgins-Pacor action to Bankruptcy Court where the Johns-Manville bankruptcy was proceeding, the Third Circuit denied removal finding that the Higgins-Pacor action was not "related to" the Johns-Manville bankruptcy proceedings because "[a]t best, it [was] a mere precursor to the potential third party claim for indemnification by Pacor against Manville." *Id.* at 995.

The Third Circuit affirmed the validity of the *Pacor* test in *In re Federal-Mogul Global, Inc.*, 300 F.3d 368 (3d Cir. 2002), where thousands of individuals brought asbestos related tort claims in state courts against various manufacturers and distributors of certain friction products, such as automobile [brake] pads. Federal-Mogul, a maker of such products, thereafter filed for Chapter 11 bankruptcy, prompting other defendants to seek removal of their remaining state court actions to the Federal-Mogul bankruptcy proceeding. Rejecting a broader application of the *Pacor* test, the Third

Circuit reiterated that the "test articulated in *Pacor* for whether a lawsuit could 'conceivably' have an effect on the bankruptcy proceeding inquires whether the allegedly related lawsuit would affect the bankruptcy proceeding without the intervention of yet another lawsuit." *Id.* at 382. Because the indemnification claims of the remaining friction-product defendants had not yet accrued and would require another lawsuit prior to having an impact on Federal-Mogul's bankruptcy proceeding, the Third Circuit was unwilling to reverse the District Court's finding that it lacked related-to subject matter jurisdiction. *Id.*

Turning to the facts presented here, the relationships are analogous to those in *Pacor* and *Federal-Mogul*. Debtors will not be bound by a judgment against the State of Montana in the state court actions; a separate adjudication is necessary to affect Debtors' estate. Notwithstanding the State of Montana's pending proof of claim in the bankruptcy proceedings, their potential indemnification claim against Debtors is not contractual and thus insufficient to establish "related-to" jurisdiction under the well established Third Circuit precedent highlighted above.

Debtors and the State of Montana argue that the situation presented here is identical to that in *In re W.R. Grace & Co. (Gerard, et al. v. W.R. Grace & Co., et al.)*, 115 Fed. Appx. 565 (3d Cir. 2004), a decision stemming from this very same bankruptcy proceeding. In *Gerard*, the Third Circuit vacated the District Court's order vacating the Bankruptcy Court's order, effectively allowing claims against MCC, Debtors' workers compensation carrier, to

remain subject to the protection of the preliminary injunction. This Court disagrees and finds that *Gerard* is distinguishable from the facts here. While Appellants are correct in that the Libby Claimants' theory of liability asserted against MCC in *Gerard* is almost the same as the theory asserted against the State of Montana, *Gerard* is nonetheless distinguishable on several grounds. The Third Circuit described the issue in *Gerard* as "not whether [the Bankruptcy Court] should exercise jurisdiction over suits pending elsewhere, nor even whether it should enjoin such suits, but rather, whether it should modify an injunction already entered in the Bankruptcy Court in favor of Grace and MCC." *Gerard*, 115 Fed. Appx. at 567. Here, unlike *Gerard* where the an [*sic*] injunction was already in place as to MCC, Debtors are seeking to expand the injunction to include the State of Montana. Had the Libby Claimants sought to modify an injunction already issued under section 105(a) as to the State of Montana, the analysis may have been different. However, in assessing whether to expand an injunction to include additional parties, as is the case here, the Bankruptcy Court was correct to first analyze jurisdiction.

Furthermore, the facts of *Gerard* are distinguishable. In *Gerard*, MCC asserted contractual indemnity rights which could have a direct impact on the estate.[14] At issue here is a

[14] The preliminary injunction entered by the Bankruptcy Court specifically enjoining actions against MCC was based in part on a settlement agreement between Grace and MCC (dated September 1, 1991), whereby "Grace agreed to release and indemnify MCC against any future asbestos-related claims filed against MCC that arose out of alleged liability on the part of

potential common law indemnification claim against Debtors pending the outcome of the state action, which falls far short of direct or automatic liability on the part of Debtors' estate. Both *Pacor* and *Federal-Mogul* addressed this distinction and specifically found that indemnification claims that had not yet accrued, such as the indemnification claim here, were insufficient in establishing "related-to" jurisdiction. *Pacor*, 743 F.2d at 995; *Federal-Mogul*, 300 F.3d at 382. Therefore, the Court is unpersuaded by the State of Montana and Debtors' contention that the facts in *Gerard* are identical to the facts here.

Appellants also argue that the Third Circuit's ruling in *In re Combustion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2004), highlights additional factors that weigh in favor of finding jurisdiction to expand the injunction. Specifically, Appellants contend that under *Combustion Engineering*, the Court should consider factors of "derivative liability" and "unity of interest," which both exist here. The Court disagrees. To the extent that *Combustion Engineering* may establish additional considerations, those considerations do not support a finding of jurisdiction in this case. In *Combustion Engineering*, the Third Circuit discussed "unity of interest" and "derivative liability" in the context of explaining the Sixth Circuit's finding of "related to" jurisdiction in *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996), a decision where the personal injury liability of both

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Grace." *Gerard*, 115 Fed. Appx. at 567. The Libby Claimants subsequently filed a motion to modify the scope of the injunction, thereby prompting the Third Circuit's holding in *Gerard*.

the debtor and non-debtor defendant was based on a single product. *Combustion Engineering*, 391 F.3d at 230. In *Dow Corning*, "'each of the co-defendants was closely involved in using the same material, originating with the debtor, to make the same, singular product, sold to the same market and incurring substantially similar injuries,' "thus creating a unity of identity between co-defendants and debtors. *Id.* at 231 (quoting *Arnold v. Garlock, Inc.*, 278 F.3d 426, 440 (6th Cir. 2001)). While mentioning these additional factors, the Third Circuit concluded that they did not establish "related to jurisdiction" in *Combustion Engineering* because common production sites alone were an insufficient "basis for the kind of 'unity of interest' that could give rise to 'related to' jurisdiction." *Combustion Engineering*, at 391 F.3d 232.

Similarly, these alleged additional factors do little to support Appellants' appeal here. The claims brought against the State of Montana by the Libby Claimants are a result of the State of Montana's alleged failure to warn the Libby Claimants of the risks of asbestos at Debtors' work place. While the claims arguably arise from a common production site, the State of Montana and Debtors have neither the "unity of interest" or "derivative liability" presented in *Dow Corning* to justify "related to" jurisdiction. Montana's liability is predicated on its own alleged violation of a governmental duty imposed under Montana law. Therefore, the Court declines to find that these additional factors establish "related to" jurisdiction for the purpose of expanding the preliminary injunction.

The Court is bound by the long standing Third Circuit precedent of *Pacor* and *Federal-Mogul*. The relationships here are analogous in that the state court actions simply have the potential to give rise to a common law indemnification claim against Debtors pending the outcome. Therefore, the Court concludes that related-to subject matter jurisdiction does not exist for the purpose of expanding the injunction to include the state court actions.

III. CONCLUSION

For the reasons stated above, the Bankruptcy Court's Order denying Debtors' request to expand the preliminary injunction to include the state court actions is affirmed. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

In re: W. R. GRACE & CO., *et al.*,
Debtors.

W. R. GRACE & CO., *et al.*,
Appellants,

v.

LIBBY CLAIMANTS,
Appellees.

CIVIL ACTION NO. 08-246
BANKRUPTCY CASE NO. 01-1139
ADV. PROC. NO. 01-771

ORDER

AND NOW, this 12th day of August, 2008, upon consideration of Appellants W. R. Grace & Co., *et al.*'s ("Grace" or "Debtors") Motion for Leave to Appeal Order Denying Injunction (Adv. Proc. Docket No. 495) and Appellees Libby Claimants' Motion in Opposition (Adv. Proc. Docket No. 505), as well as Appellant State of Montana's Brief on Appeal (Docket No. 10), Appellants Debtors' Brief on Appeal (Docket No. 12), and Appellees Libby Claimants' Brief on Appeal (Docket No. 14), it is hereby **ORDERED** that Appellants Debtors' Motion for Leave to Appeal is **GRANTED**. It is further **ORDERED** that the Bankruptcy Court's Order, dated April 13, 2007, Denying Debtors' Motion to Expand the Preliminary Injunction to Include

Actions Against the State of Montana (Adv. Proc. Docket No. 419) is **AFFIRMED**.

BY THE COURT:

/s/ Ronald L. Buckwalter
RONALD L. BUCKWALTER, S.J.

IN THE UNITED STATES
BANKRUPTCY COURT
FOR DISTRICT OF DELAWARE

IN RE: W. R. GRACE & CO., *et al.*,
Debtor(s).

W.R. GRACE & CO., *et al.*,
Plaintiffs.

-against-

MARGARET CHAKARIAN, ROBERT H. LOCKE, JACKIE ELLISON, MARCIA ELLISON, CARY YOUPEE, RUPPLE K. PERRY, THE STATE OF MICHIGAN, ALICE SMOKLER, HOME SAVINGS TERMITE CONTROL, GLORIA MUNOZ, EXXON MOBILE CORPORATION ET AL., AND JOHN DOES 1-1000,
Defendants.

Bankruptcy No. 01-01139 (JKF)
Jointly Administered
Chapter 11
Adversary No. 01-771
Related to Doc. No. 359

MEMORANDUM OPINION[1]

The matter before the Court is the Debtors' Motion to Expand Their Preliminary Injunction to Include Actions Against the State of Montana (the

[1] This Memorandum Opinion constitutes our findings of fact and conclusions of law.

"Expansion Motion"),[2] which seeks to add within the scope of the preliminary injunction 120[3] actions currently pending against the State of Montana in Montana state courts (the "State Court Actions").[4] The State of Montana has filed a proof of claim in an unliquidated amount asserting indemnification/ contribution from Debtors relating to the State Court Actions. The preliminary injunction was issued in this adversary to prevent the filing or continued prosecution of actions against third parties that arise from alleged exposure to asbestos indirectly or directly caused by Debtors.[5] The claimants involved in the State Court Actions ("Montana Plaintiffs") filed an objection to the Expansion Motion.[6] The Official Committee of Unsecured Creditors submitted

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[2] Doc. No. 359.

[3] Debtors' motion, as filed, sought relief with respect to 97 pending State Court Actions. As of January 30, 2006, Debtors asserted that the number of State Court Actions has grown to 120. Debtors' Motion to Dismiss Appeal, Doc. No. 383, at 2. The actual number of plaintiffs or actions has not been identified in any pleading.

[4] Several months prior to the filing of the Expansion Motion, the State of Montana filed a motion for relief from the automatic stay in order to join Debtors as third-party defendants to the State Court Actions. Motion of State Of Montana For Relief From the Automatic Stay, Bankruptcy No. 01-01139, Doc. No. 8582. The court's decision regarding the motion for relief from the automatic stay will be entered as a separate opinion and corresponding order.

[5] Order Granting Modified Preliminary Injunction, Adversary No. 01-771, Doc. No. 87.

[6] Opposition of Libby Claimants to Debtors' Motion to Expand the Preliminary Injunction to Include Actions Against the State of Montana, Adversary No. 01-771, Doc. No. 363.

a joinder[7] to the Expansion Motion and the State of Montana filed a response stating it did not object to the relief sought unless the relief affects certain of its rights.[8]

On April 2, 2001 (the "Petition Date"), Debtors filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. Soon after, the United States Trustee appointed the Property Damage Committee, the Official Committee of Asbestos Personal Injury Claimants, the Official Committee of Unsecured Creditors, and the Official Committee of Equity Holders. Debtors continue in possession of their property and the management of their businesses as debtors-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

The preliminary injunction at issue in this proceeding was entered on May 3, 2001, barring the prosecution of currently pending actions against various affiliated entities and third parties whose

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[7] Joinder of the Official Committee of Unsecured Creditors in the Debtors' Motion to Expand Their Preliminary Injunction to Include Action Against the State of Montana, Adversary No. 01-771, Doc. No. 359.

[8] Response to Debtors' Motion to Expand Preliminary Injunction to Include Actions Against the State of Montana, Adversary No. 01-771, Doc. No. 362, at 1, 2. "Montana does not object to the relief requested in the Motion to Expand Injunction if the motion does not effect [*sic*] Montana's rights to: (a) object to any plan of reorganization of the Debtors relating to the treatment of Montana under such a plan; (b) preserve its contribution and/or indemnification claims it may have against Debtors relating to the Montana action; (c) take all such actions as Montana shall determine appropriate in order to preserve any claims or causes of actions it may have relating to the Montana actions; and (d) continue to seek relief from the automatic stay in the event the Motion is denied."

purported liability was solely derivative of Debtors. Adversary No. 01-771, Doc. No. 32. On January 22, 2002, the court entered an order modifying the preliminary injunction to include certain additional affiliates and to reinstate the bar against the commencement of new actions against affiliates arising from alleged exposure to asbestos whether indirectly or directly caused by Debtors.[9] On February 4, 2002, certain Montana Plaintiffs attempted to modify the injunction in order to pursue an alleged direct cause of action claim against Maryland Casualty Company ("MCC"), one of Debtors' insurers.[10] This court denied the motions and was affirmed by the U.S. Circuit Court of Appeals for the Third Circuit. *In re W.R. Grace & Co. (Gerard v. W.R. Grace & Co.)*, 115 Fed. Appx. 565 (3d Cir. 2004). The Montana Plaintiffs next attempted to pursue their asbestos personal injury claims arising out of Debtors' mining operations in Libby, Montana, by commencing suit against Montana Vermiculite Company ("MVC"), the former owners of Debtors' mining operations.[11] This court amended the injunction to stay the actions against MVC on February 25, 2005.[12]

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[9] Adversary No. 01-771, Doc. No. 87, Order Granting Modified Preliminary Injunction.

[10] Named plaintiffs involved in the State Court Actions were also previously involved in the claims against MCC and Montana Vermiculite Company.

[11] *See* Motion to Expand the Preliminary Injunction to Include Actions Against Montana Vermiculite Company, Adversary No. 01-771, Doc. No. 153.

[12] Amended Order Granting Motion to Expand Preliminary Injunction Actions Against Montana Vermiculite Company, Adversary No. 01-771, Doc. No. 358.

The various State Court Actions relate to claims arising from the mining and processing of vermiculite containing asbestos within the State of Montana. Most plaintiffs allege periods of employment with Debtors and/or their predecessors from 1947 through 1993. At least 21 of the 120 State Court Actions were filed first only against Debtors and were amended, after Debtors filed bankruptcy, to include the State of Montana. The others were filed against the State of Montana after Debtors were in bankruptcy, at which time actions in state court against Debtors were precluded by the automatic stay. The Montana Plaintiffs assert the same cause of action (negligence in failing to take sufficient action to protect and to warn the plaintiffs about alleged asbestos hazards) against both Debtors and the State of Montana.

According to one of the State Court Actions, *Orr v. State of Montana*, 106 P.3d 100 (Mt. 2004), Montana's State Board of Health ("BOH") inspected the Libby mine on a regular basis beginning in 1956.

> During each State inspection between 1956 and 1974, the State inspectors found unsanitary and unhealthful conditions. The State notified Zonolite,[13] and later Grace, of the dangerous conditions after each inspection, explaining the seriousness of asbestosis and its likely fatal outcome, but did not inform the Mine workers, including the Miners, of the dangers. With the exception of identifying

[13] The Zonolite Company was acquired by W.R. Grace in 1963.

> the hazardous conditions and telling the Mine's owner/managers to correct the problems, the State took no steps to ensure that the Mine's owners/managers responded in a manner that provided a safe working environment.

106 P.3d at 104. In the Nineteenth Judicial District Court of Montana (Lincoln County), the State of Montana obtained dismissal of the *Orr* claim on the basis that the State did not owe a duty to the plaintiffs. On appeal, the Supreme Court of Montana reversed the trial court's dismissal, concluding that the State had a legal duty to the Libby Mine workers,[14] and remanded the case for determination of whether the State of Montana breached that duty.

Debtors assert that the motion to include Montana within the injunction in this case should be granted because the State of Montana and Debtors share an identity of interest such that a suit against the nondebtor is essentially a suit against the Debtors and the State Court Actions will have an adverse impact on the Debtors' ability to accomplish reorganization.[15] The Montana Plaintiffs make two arguments against including the State in the

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[14] "We conclude that the State had a statutory duty under [numerous Montana Statutes] to protect the safety and health of the Miners by warning them of known dangers associated with their workplace." *Orr*, 106 P.3d at 111.

[15] These two factors, identity of interest and adverse impact, are part of the "unusual circumstances" test articulated in *Matter of Zale Corp.*, 62 F.3d 746, 761 (5th Cir. 1995), for determination of whether a § 105(a) injunction is proper. *See also In re Prussia Associates*, 322 B.R. 572 (Bankr. E.D. Pa. 2005), and *Matter of Rickel Home Centers, Inc.*, 199 B.R. 498, 501 (Bankr. D. Del. 1996).

injunction: (1) the court lacks subject matter jurisdiction to enjoin their separate and independent tort claims against the State of Montana because the State Actions are not related to the bankruptcy within the meaning of 28 U.S.C. § 1334(b), and (2) the Expansion Motion fails to establish grounds for entry of an injunction against a third-party litigant under the stringent standards established by case law.

The U.S. Court of Appeals for the Fifth Circuit explained that:

> Subject matter jurisdiction and power [under § 105 of the Bankruptcy Code] are separate prerequisites to the court's capacity to act. Subject matter jurisdiction is the court's authority to entertain an action between the parties before it. Power under Section 105 is the scope and forms of relief the court may order in an action in which it has jurisdiction.

Matter of Zale Corp., 62 F.3d 746, 751 (5th Cir. 1995) (citing *In re American Hardwoods, Inc. (American Hardwoods, Inc. v. Deutsche Credit Corp.)*, 885 F.2d 621, 624 (9th Cir. 1989)). While aspects of the § 105(a) analysis may be relevant to "related-to" jurisdiction, the two inquiries are analytically distinct. *In re Combustion Engineering, Inc.*, 391 F.3d 190, 224-25 (3d Cir. 2004). Section 105 (a) "does not provide an independent source of federal subject matter jurisdiction." *Id.* at 225. Therefore, this court must establish subject matter jurisdiction before considering the merits of a § 105(a) injunction.

Section 1334(b) provides that "... the district courts shall have original but not exclusive

jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). Section 157(a) of title 28 of the United States Code permits the district court to refer "any or all proceedings arising under title 11 or arising in or related to a case under title 11 ... to the bankruptcy judges for the district." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995).

The generally accepted test for determining whether a bankruptcy court has subject matter jurisdiction over litigation between nondebtor third parties is whether "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). However, as exhibited by *Pacor* itself, application of this test has proven to be most difficult with cases involving indemnification and contribution.

In *Pacor*, John and Louise Higgins initially brought suit against Pacor, a distributor of chemical supplies, in Pennsylvania state court, seeking damages allegedly caused by Mr. Higgins' work-related exposure to asbestos supplied by Pacor. Pacor, in turn, filed a third party complaint impleading the Johns-Manville Corporation, which soon after filed a chapter 11 bankruptcy petition. In determining whether the bankruptcy court had subject matter jurisdiction, the U.S. Court of Appeals for the Third Circuit held that the primary action between the third parties, Higgins and Pacor, would have no effect on the bankruptcy estate.

> At best, it is a mere precursor to the potential third party claim for indemnification by Pacor against Manville.

> ... Even if the Higgins-Pacor dispute is resolved in favor of Higgins (thereby keeping open the possibility of a third party claim), Manville would still be able to relitigate any issue, or adopt any position, in response to a subsequent claim by Pacor. Thus, the bankruptcy estate could not be affected in any way until the Pacor-Manville third party action is actually brought and tried.

Id. at 995. The court held that a bare claim of common law indemnity was not enough to establish jurisdiction; any effect on the estate is indirect and contingent on intervening litigation. "[A]ny judgment received by the plaintiff ... could not itself result in even a contingent claim against Manville, since Pacor would still be obligated to bring an entirely separate proceeding to receive indemnification." *Id.* That is, the outcome of the action itself would have no effect on the estate and a separate indemnification action would be required before an effect could be established.

On the other hand, the U.S. Court of Appeals for the Sixth Circuit adopted a different interpretation of the *Pacor* test. In *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996), the Court of Appeals found related-to jurisdiction for a mass tort claim against the shareholders of a chapter 11 debtor because of the possibility of indemnity or contribution claims against the debtor from the shareholders. The court glossed over the rationale and the ultimate outcome of the *Pacor* opinion, looking to the word "conceivable" and stating that:

> A key word in [the] test is 'conceivable.' Certainty, or even likelihood, is not a requirement. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact on 'the debtor's rights, liabilities, options, or freedom of action' or the 'handling and administration of the bankrupt estate.'

Id. at 491 (quoting *In re Marcus Hook Dev. Park, Inc.*, 943 F.2d 261, 264 (3d Cir. 1991)). The court held that the possibility of indemnity or contribution claims alone was sufficient to satisfy the *Pacor* test.

In *In re Federal Mogul Global, Inc.*, 300 F.3d 368 (3d Cir. 2002), *cert. denied sub nom. DaimlerChrysler v. Official Committee of Asbestos Claimants*, 537 U.S. 1148 (2003), the Court of Appeals for the Third Circuit rejected an argument based on the decision of the Sixth Circuit in *In re Dow Corning*, stating that focusing on the word "conceivable" ignores the precise holding of *Pacor*. "The test articulated in *Pacor* for whether a lawsuit could 'conceivably' have an effect on the bankruptcy proceeding inquires whether the allegedly related lawsuit would affect the bankruptcy proceeding without the intervention of yet another lawsuit." *Id.* at 382. The bankruptcy court accurately reiterated the holding of *Pacor* stating that jurisdiction exists where "the potential impact on the debtor's estate would have been direct with no intervening adjudication or joinder of issue necessary for judgment against the non-debtor to affect assets, re-prioritize creditors and thwart the bankruptcy court's administration of the estate." *In re Federal-Mogul Global, Inc.*, 282 B.R. 301, 307 (Bankr. D. Del. 2002), quoting *Celotex Corp. v.*

Edwards, 514 U.S. 300, 308 (1995). In *Federal-Mogul*, jurisdiction in the bankruptcy of the debtor, an automobile parts supplier, was sought for the third party action between personal injury claimants and the automobile companies (including the "Big Three" Auto Makers) who used debtors' asbestos-containing automobile products in their own products. Following its decision in *Pacor*, the court held that related to jurisdiction was lacking because it would take the intervention of yet another lawsuit before the defendants would have indemnity claims against Federal-Mogul. 282 B.R. at 306. To the extent that the Third Circuit and Sixth Circuit cases conflict regarding the application of the *Pacor* rule to indemnification/contribution claims, this court must follow the case law of the Third Circuit.

The position claims in the State Court Actions is nearly identical to the claims in *Pacor* and *Federal Mogul*. Before any effect on Debtors can be realized, the State of Montana must first be found liable in state court and then pursue its claim for indemnification in bankruptcy court. While the court in *Orr v. State of Montana*, *supra*, found that a duty existed on behalf of the State, the case was remanded for determination of whether the State of Montana breached that duty. If breach is not found, indemnification/contribution is not possible. If breach is found, the Montana Plaintiffs "would still be obligated to bring an entirely separate proceeding to receive indemnification." *Pacor*, 743 F.2d at 995. Montana law prohibits the State of Montana from litigating or establishing a factual basis (i.e., percentage of comparative fault) against Debtors for either contribution or indemnity during the course of

the State Court Actions.[6] *See* Mont. Code Ann. § 27-1-703 (1997), and *Plumb v. Forth Judicial Dist. Court*, 927 P.2d 1011 (Mont. 1996) (entry of findings against non-party violates substantive due process). A judgment against the State of Montana will not bind Debtors. An intervening adjudication is necessary to affect the estate.

The bankruptcy court in *Federal-Mogul* noted that the decisions in *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995), *In re A.H. Robins Co., Inc.*, 828 F.2d 1023 (4th Cir. 1987), cert. denied, 485 U.S. 969 (1988), and *Halper v. Halper*, 164 F.3d 830 (3d Cir. 1999), followed the Third Circuit's interpretation of *Pacor* and the results could be "explained at least in part by the recognition that they each involved property or rights belonging to the estate." 282 B.R. at 307. *Celotex* involved the debtor's cash collateral, *A.H. Robins* concerned insurance proceeds, and *Halper* addressed a guarantee which was available as a creditor's alternative source of recovery. *Id.* The rulings in each of these third party cases would have had a direct effect on the estate. This distinction can also be applied to reject Debtors' assertion that the inclusion in the injunction of the claims against MCC and MVC supports the expansion of the injunction to the State of Montana Actions. MCC was a workers compensation insurer for Debtors and a ruling against MCC would have

[6] This court is not asked to, and does not, express an opinion as to the merits of a possible indemnification/contribution claim that might be brought against the estate by the State of Montana if it is found liable based upon the State's independent duty to third parties.

had a direct impact on the estate. This court in the MVC litigation explained that:

> In this case, if there is a judgment against MVC which resulted in damages for asbestos-related injuries, the Montana Plaintiffs would look to Royal with respect to the insurance policies and Debtor's indemnity obligations under their settlement with Royal would be triggered. The indemnity between Debtors and Royal is contractual; in *Pacor* a common law indemnity claim existed and was held to be an insufficient basis for "related to" jurisdiction.

In re W.R. Grace & Co. (W.R. Grace & Co. v. Chakarian), 315 B.R. 353, 359 (Bankr. D. Del. 2004). Similarly, in *A.H. Robbins Co., Inc. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), cert. denied 479 U.S. 876 (1986), an injunction was proper because the indemnification rights were absolute; a judgment against the co-defendant indemnitee would effectively bind the debtor. Here, however, as in *Pacor* and *Federal Mogul*, the State Court Actions will not be binding on the estate and will not have a direct impact on the estate without additional intervening adjudication.

Additionally, in *Orr*, it is the actions of the State of Montana, not Debtors, which are the basis of the claims. The question in *Orr* became one of whether, assuming the State had the information, it had an independent responsibility to distribute or act upon the information for the benefit of the plaintiffs in the litigation. "[T]he State had discretion to determine what information to gather, but once that

information was gathered, it had no discretion about whether to distribute it." *Orr*, 106 P.3d at 108.

Based on the discussion above, related-to subject matter jurisdiction does not exist for the purpose of expanding the injunction to include the State Court Actions. Without a finding of such jurisdiction, it is unnecessary to conduct an analysis of whether an injunction under § 105(a) is appropriate. Although, as this represents the Montana Plaintiffs' third attempt to pursue these claims, we suspect that this may be yet another effort at an end run around the automatic stay, in this situation, the Supreme Court of Montana has articulated a cause of action separate and apart from the conduct of Debtors. The motion to expand the preliminary injunction to include the State of Montana will be denied. We note, however, that the automatic stay remains in effect as to the Debtors and their property, including their products, and nothing in this Opinion and Order authorizes relief from the stay as to any allegation, cause of action, etc., against the Debtors' estates, the Debtors, or those parties protected by the preliminary injunction, or against property of the estate or property of the Debtors.

An appropriate order will be issued.

DATE: April 13, 2007

/s/ Judith K. Fitzgerald
Judith K. Fitzgerald
United States Bankruptcy Judge

IN THE UNITED STATES
BANKRUPTCY COURT
FOR DISTRICT OF DELAWARE

IN RE:
W. R. GRACE & CO., *et al* ,
Debtor(s).

W. R. GRACE & CO., *et al.*,
Plaintiffs.
-against-
MARGARET CHAKARIAN, *et al.*, and
JOHN DOES 1-1000,
Defendants.
Bankruptcy No. 01-01139 (JKF)
Jointly Administered
Chapter 11
Adversary No. A-01-771
Related to Doc. No. 426, 427, 419, 420, 466

MEMORANDUM OPINION[1]

The matters before the court are the (1) Debtors' Motion to Alter and Amend the Court's Order Denying Its Request to Expand the Preliminary Injunction to Include Actions Against the State of Montana[2] and (2) Motion for Reconsideration of Court's Opinion and Order Denying Debtors' Motion for Expansion of Preliminary Injunction Entered April 16, 2007[3] (collectively, the "Motions to Reconsider"). We note that our Memorandum Opinion and Order, 366 B.R. 295 (Bankr. D. Del.

[1] The court's jurisdiction was not at issue. This Memorandum Opinion constitutes our findings of fact and conclusions of law.

[2] Doc. No. 427, filed on April 26, 2007.

[3] Doc. No. 426, filed on April 26, 2007.

2007),[4] are dated April 13, 2007, but were docketed on April 16, 2007; hence the reference in the Motion for Reconsideration. We will refer to our opinion and order by reference to the April 13 date and/or to the Bankruptcy Reporter cite. The Motions to Reconsider ask the court to reserve its April 13 Memorandum Opinion and Order,[5] docketed on April 16, 2007, which denied Debtors' motion[6] to expand the preliminary injunction to include actions against the State of Montana ("State Court Actions"). The Official Committee of Asbestos Personal-Injury Claimants ("ACC") and the claimants involved in the State Court Actions ("Montana Plaintiffs")[7] both filed objections to the Motions to Reconsider.[8]

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[4] On the adversary docket the Memorandum Opinion is at Doc. No. 419 and the Order is at Doc. No. 420.

[5] Order Denying Debtors' Motion to Expand the Preliminary Injunction to Include Actions Against the State of Montana, Doc. No. 420. Memorandum Opinion, Doc. No. 419. *See In re W.R. Grace & Co.*, 366 B.R. 295 (Bankr. D. Del. 2007).

[6] Debtors' Motion to Expand Their Preliminary Injunction to Include Actions Against the State of Montana, Doc. No. 359.

[7] The Montana Plaintiffs also call themselves "Libby Claimants." *See*, for example, Doc. No. 442 designated as filed by Libby Claimants. However, the document filed at Doc. No. 442 is titled and refers to "Montana Plaintiffs." Doc. No. 442 refers to Doc. No. 363, footnote 1 of which refers to Doc. No. 4807 in the main case, Bankr. No. 01-1139. Doc. No. 4807 is a 2019 statement listing the Libby/Montana claimants by name. We refer to them herein as "Montana Plaintiffs."

[8] Opposition of the Official Committee of Asbestos Personal-Injury *[sic]* Claimants to the Debtors' and the State of Montana's Motions 10 Reconsider the Court's Decision Denying a Stay of Litigation Against Montana, Doc. No. 443; Objection to Motions filed By Debtors and State of Montana to Reconsider Order Denying Debtors' Motion to Expand the Preliminary

BACKGROUND

On April 2, 2001 (the "Petition Date"), Debtors filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. On the same date, Debtors filed this adversary proceeding. Soon after, the United States Trustee appointed the Property Damage Committee, the Official Committee of Asbestos Personal Injury Claimants, the Official Committee of Unsecured Creditors, and the Official Committed of Equity Holders. Debtors continue in possession of their property and the management of their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

The original preliminary injunction in this adversary proceeding was signed on May 3, 2001,[9] barring the prosecution of then pending actions against various entities affiliated with Debtors and certain third parties whose purported liability was solely derivative of W. R. Grace. On January 22, 2002, the court entered an order modifying the preliminary injunction to include certain additional affiliates and to reinstate the bar against the commencement of new actions against affiliates arising from alleged exposure to asbestos whether indirectly or directly cause[d] by W. R. Grace.[10] On February 4, 2002, certain Montana Plaintiffs attempted to modify the injunction in order to pursue a prepetition state court suit based on an alleged direct cause of action against Maryland Casualty

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Injunction to Include Actions Against the State of Montana, Doc. No. 442.

[9] The order was docketed on May 6, 2001. *See* Doc. No. 32.

[10] *See* Doc. No. 87, Order Granting Modified Preliminary Injunction.

Company ("MCC"), one of W. R. Grace's insurers.[11] This court denied the attempt to modify, Doc. Nos. 109, 133, which was ultimately upheld by the U.S. Circuit Court of Appeals for the Third Circuit. *In re W.R. Grace & Co. (Gerard, et al. v. W.R. Grace & Co., et al.)*, 115 Fed. Appx. 565 (3d Cir. 2004). The Montana Plaintiffs next attempted to pursue their asbestos personal injury claims arising out of W. R. Grace's Libby mining operations by pursuing a prepetition suit against Montana Vermiculite Company ("MVC"), the former owners of certain assets one of the Debtors purchased in 1963. *See* Doc. No. 153, Debtors' Motion to Expand the Preliminary Injunction to Include Actions Against [MVC]. This court amended the injunction to stay the actions against MVC on February 25, 2005.[12]

On August 22, 2005, Debtors filed a Motion to Expand Their Preliminary Injunction to Include Actions Against the State of Montana (the "Injunction Motion"),[13] seeking to expand the preliminary injunction to include the State Court

[11] *See* Doc. No. 85. The pleading is captioned and docketed as a motion to intervene filed on behalf of Carol Gerard but sought clarification of the scope of the injunction or, alternatively, a modification of the injunction so the proposed intervenor could obtain documents for us in her Maryland state court action. Named plaintiffs involved in the State Court Actions were also previously involved in the claims against Maryland Casualty Company, Doc. Nos. 109, 135, 154, and Montana Vermiculite Company, Doc. Nos. 298, 299, in this adversary. *See* Doc. Nos. 109, 135, 154 (MCC); Doc. Nos. 298, 299 (MVC).

[12] Adv. No. 01-771 at Doc. No. 358. The order was docketed on February 28, 2005.

[13] Doc. No. 359.

Actions filed post-petition against the State of Montana for, among other things, negligence in failing to warn about the risks of asbestos at the Debtors' workplace and mine in Libby, Montana. The Montana Plaintiffs filed an objection to the Injunction Motion.[14] The Official Committee of Unsecured Creditors submitted a joinder[15] to the Injunction Motion and the State of Montana filed a response stating it did not object to the relief sought unless the relief affected certain of its rights.[16]

On December 19, 2005, the court held a hearing on the Injunction Motion. On April 13, 2007, the court issued a Memorandum Opinion and Order denying Debtors' Injunction Motion ("the April 13 Memorandum Opinion and Order"), finding that "related to subject matter jurisdiction [did] not exist

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[14] Opposition of Libby Claimants to Debtors' Motion to Expand the Preliminary Injunction to Include Actions Against the State of Montana, Adversary No. 01-771, Doc. No. 363.

[15] Joinder of the Official Committee of Unsecured Creditors in the Debtors' Motion to Expand Their Preliminary Injunction to Include Action Against the State of Montana, Adversary No. 01-771, Doc. No. 361.

[16] Response to Debtors' Motion to Expand Preliminary Injunction to Include Actions Against the State of Montana, Adversary No. 01-771, Doc. No. 362, at 1-2 ("Montana does not object to the relief requested in the Motion to Expand Injunction if the motion does not effect /*sic*/ Montana's rights to: (a) object to any plan of reorganization of the Debtors relating to the treatment of Montana under such a plan; (b) preserve its contribution and/or indemnification claims it may have against Debtors relating to the Montana actions; (c) take all such actions as Montana shall determine appropriate in order to preserve any claims or causes of actions it may have relating to the Montana actions; and (d) continue to seek relief from the automatic stay in the event the Motion is denied").

for the purpose of expanding the injunction to include the State Court Actions.[17] The Debtors and the State of Montana subsequently filed the Motions to Reconsider now before us and the ACC and Montana Plaintiffs objections thereto.[18]

On May 21, 2007, this court held a hearing on the Motions to Reconsider.[19] At the hearing, the court took the Motions to Reconsider under advisement and orally entered a temporary stay pending its ruling on the motions. The court entered its written order on August 29, 2007 ("Stay Order").[20]

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[17] Doc. Nos. 419, 420, *In re W. R. Grace & Co., et al. (W.R. Grace & Co., et al. v. Chakarian, et al.)*, 366 B.R. 295 (Bankr. D. Del. 2007).

[18] Debtors' Motion to Alter and Amend the Court's Order Denying Its Request to Expand the Preliminary Injunction to Include Actions Against the State of Montana, Doc. No. 427; State of Montana's Motion for Reconsideration of Court's Opinion and Order Denying Debtors' Motion for Expansion of Preliminary Injunction, Doc. No. 426. The Montana Plaintiffs' opposition is docketed as being filed by "Libby Claimants" and appears on the docket as Objection to Motions Filed By Debtors and State of Montana to Reconsider Order Denying Debtors' Motion to Expand the Preliminary Injunction to Include Actions Against the State of Montana." The document itself is captioned as "Opposition of Montana Claimants to Motions ..." Doc. No. 442. The ACC's objection is docketed and titled as Opposition of the Official Committee of Asbestos Personal Injury [sic] Claimants to the Debtors' and the State of Montana's Motions to Reconsider the Court's Decision Denying Stay of Litigation Against Montana. Doc. No. 443.

[19] *See* Transcript of 5/21/2007, Bankr. No. 01-1139, Doc. No. 15948.

[20] Doc. No. 466. This order is docketed as an amended order and refers to Burlington Northern Santa Fe Railway company ("BNSF") and an order entered at Doc. No. 453. BNSF is the subject of a separate pending matter which the court also has

The Montana Plaintiffs thereafter appealed the entry of the Stay Order to the United States District Court for the District of Delaware.[21] The Debtors and the State of Montana filed Motions to Dismiss the Appeal and corresponding briefs.[22] The Montana Plaintiffs filed opposition to the motions to dismiss.[23] On January 22, 2008, the District Court entered a Memorandum and Order granting the Debtors' and State of Montana's motions to dismiss the appeal.[24]

DISCUSSION

The Motions to Reconsider were brought pursuant to Fed. R. Civ. P. 59(e),[25] incorporated into bankruptcy proceedings by Fed. R. Bankr. P. 9023.[26] Pursuant to Fed. R. Civ. P. 59(e), a judgment may be altered or amended only when the party seeking reconsideration shows: (1) there has been an intervening change in the controlling law; (2) there is newly discovered evidence which was not available to the moving party at the time of judgment; or

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under advisement. *See, e.g.*, Doc. Nos. 453, 459, 461, 462, 463. We do not address BNSF issues here.

[21] Doc. No. 467, Notice of Appeal; Civil Action No. 07-609.

[22] Civil Action No. 07-609, Doc. Nos. 6-10, 14.

[23] Civil Action No. 07-609, Doc. Nos. 11, 12.

[24] Civil Action No. 07-609, Doc. No. 15; Adv. Doc. Nos. 474-476. The District Court's Memorandum is published on Westlaw as *Libby Claimants v. W.R., Grace & Co.*, 2008 WL 205310 (D. Del., Jan. 22, 2008).

[25] "(e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e).

[26] Fed. R. Bankr. P. 9023 provides that Fed. R. Civ. P. 59 applies in bankruptcy cases except as provided in Fed. R. Bankr. P. 3008 regarding claims allowance.

(3) there is a need to correct a legal or factual error which has resulted in manifest injustice. *Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999) (citing *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995)).

In their Motions to Reconsider, Debtors and the State of Montana allege that there is a clear need to correct a legal error which resulted in the injustice of denying the Debtors' request to expand the preliminary injunction. Debtors argue that the court "[o]verlooked binding precedent"[26] established in *In re W.R. Grace & Co. (Gerard, et al. v. W.R. Grace & Co., et al.)*, 115 Fed. Appx. 565 (3d Cir. 2004), and should correct the error by expanding the injunction to include the State of Montana. The State of Montana agreed.[28] Debtors argue, and the State of Montana concurred,[29] as they did in the initial pleadings, that the circumstances of MCC in *Gerard* are "essentially identical to those present with the State of Montana"[30] and, therefore, the court should have followed its earlier decision[31] and should have

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[27] Doc. No. 427, at 2.

[28] Doc. No. 426.

[29] Doc. No. 427 at 2; Doc. No. 426 at 4.

[30] *Id.* at 2; Doc. No. 426 at 4 ("The present case is identical to *Gerard*.")

[31] In *Gerard*, the Court of Appeals for the Third Circuit vacated the District Court's order vacating this court's order. The result was that claims against MCC remained subject to the protection of the preliminary injunction, inasmuch as claims against MCC were based on its role as Debtors' workers compensation carrier and its work with Debtors on a dust control system for Debtors' mine in Libby, Montana.

ruled that the injunction also covers suits against the State of Montana. However, this court did not "overlook" the *Gerard* case. Indeed, this court expressly cited *Gerard*[32] and distinguished it on its facts.[33]

In the April 13 Memorandum Opinion, we ruled that related-to subject matter jurisdiction did not exist for the purpose of expanding the injunction to include the State Court Actions.[34] The generally accepted test for determining whether a bankruptcy court has subject matter jurisdiction over litigation between nondebtor third parties is whether "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). *See also In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 387 (3d Cir. 2002), *cert. denied sub nom. DaimlerChrysler v. Official Committee of Asbestos Claimants*, 537 U.S. 1148 (2003). In *Pacor* and *Federal-Mogul*, the Court of Appeals for the Third Circuit found that related-to jurisdiction was lacking because there could be no direct effect on the estate without intervening litigation. *Pacor*, 743 F.2d at 995 (Higgins was not a creditor, had filed no claim against the debtor, and,

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[32] 366 B.R. at 298.

[33] 366 B.R. at 301-02.

[34] 366 B.R. at 302. Subject matter jurisdiction and power of the Bankruptcy Code are separate prerequisites to the court's capacity to act against third party Non Debtors, such as the State of Montana. *See Matter of Zale Corp.*, 62 F.3d 746, 751 (5th Cir. 1995) (citing *In re American Hardwoods, Inc. (American Hardwoods, Inc. v. Deutsche Credit Corp.)*, 885 F.2d 621, 624 (9th Cir. 1989)).

therefore, any judgment would have no effect on the estate); *Federal-Mogul*, 300 F.3d at 386 (appeal barred because basis for district court's remand was lack of related to jurisdiction).

In *Federal-Mogul*, at the bankruptcy court level, the court distinguished three cases in which courts have found jurisdiction because, although the issues involved third parties, the rulings would have a direct effect on the estates. *In re Federal-Mogul Global, Inc.*, 282 B.R. 301, 307 (Bankr. D. Del. 2002).[8] Those three cases were *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995); *In re A.H. Robins Co., Inc.*, 828 F.2d 1023 (4th Cir. 1987), *cert. denied sub nom. Oberg v. Aetna Cas. and Sur. Co.*, 485 U.S. 969 (1988); and *Halper v. Halper*, 164 F.3d 830 (3d Cir. 1999). This court's April 13 Memorandum Opinion explained that the suits against MCC and against MVC were both similar to the claims at issue in *Celotex*, *A.H. Robins Co.*, and *Halper* because of their potential to directly affect the estate without separate intervening litigation. 366 B.R. at 301-02. While the April 13 Memorandum Opinion did not go into significant detail regarding the circumstances of the suits against MCC in *Gerard*, *Gerard* was clearly grouped with *Celotex*, *A.H. Robins Co.*, and *Halper* as a case in which the claims at issue could have a "direct effect on the estate."[9]

On the other hand, we found the State Court Actions to be similar to those claims in *Pacor* and

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[8] Mandamus denied by *In re Federal-Mogul Global, Inc.*, 300 F.3d 368 (3rd Cir. 2002), *cert. denied sub nom. DaimlerChrysler Corp. v. Official Committee of Asbestos Claimants*, 537 U.S. 1148 (2003).

[9] 366 B.R. at 301.

Federal-Mogul because there could be no direct effect on the estate without intervening adjudication.

> Before any effect on Debtors can be realized, the State of Montana must first be found liable in state court and then pursue its claim for indemnification in bankruptcy court. While the court in *Orr v. State of Montana, supra,* found that a duty existed on behalf of the State, the case was remanded for determination of whether the State of Montana breached that duty. If breach is not found, indemnification/contribution is not possible. If breach is found, Montana Plaintiffs "would still be obligated to bring an entirely separate proceeding to receive indemnification." *Pacor,* 743 F.2d at 995. Montana law prohibits the State of Montana from litigating or establishing a factual basis (i.e., percentage of comparative fault) against Debtors for either contribution or indemnity during the course of the State Court Actions. See Mont. Ann. § 27-1-703 (1997), and *Plumb v. Fourth Judicial Dist. Court,* 927 P.2d 1011 (Mont. 1996) (entry of findings against non-party violates substantive due process). A judgment against the State of Montana will not bind Debtors. An intervening adjudication is necessary to affect the estate.

366 B.R. at 301. Allegations of common law indemnification against Debtors in *Pacor, Federal-Mogul,* and this court's April 13, 2007, decision

regarding the State of Montana were found to be an insufficient basis for related-to jurisdiction because there could be no direct effect on the bankruptcy estate without intervening adjudication. In contrast, MCC in *Gerard* asserted contractual indemnity rights which could have a direct impact on the estate.[37] Debtors and MCC, a workers' compensation insurer for the Debtors, had entered into a settlement agreement whereby "Grace agreed to ... indemnify MCC against any future asbestos-related claims filed against MCC that arose out of alleged liability on the part of Grace." *Gerard, et. al. v. W.R. Grace & Co., et. al.*, 115 Fed. Appx. 565, 566 (3d Cir. 2004).

As explained above, this court distinguished the MCC claims in *Gerard* from the State of Montana claims. Nothing in the record before us indicates an error of law or fact that resulted in manifest injustice occasioned by our April 13 Memorandum Opinion. Therefore, the Debtors and the State of Montana failed to show grounds under Fed. R. Bankr. P. 9023 upon which this court could base a decision granting the Motions to Reconsider.

The court also notes that the Motions to Reconsider presented arguments nearly identical to those in the initial pleadings requesting expansion of the injunction. Motions to alter or amend a

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[37] *See* Doc. No. 100, Objection to Motion of Carol Gerard to Clarify the Scope of the Preliminary Injunction or, in the Alternative, to Modify the Preliminary Injunction Filed by [MCC].

judgment are not intended to permit a "rehash [of] arguments already briefed."[38]

It should also be noted that the Montana Plaintiff's submitted a letter to this court, pursuant to Del. Bankr. L.R. 7007-1(b),[39] calling to the court's attention and briefly discussing the opinion of the Court of Appeals for the Second Circuit in *In re Johns-Manville Corp. (Travelers Casualty and Surety Co., et al. v. Chubb Indemnity Insurance Co., et al.*, __ F.3d __, 2008 WL, 399010 (2d Cir., Feb. 15, 2008).[40] Debtors and the State of Montana both responded to the Rule 7007-1(b) filing from the Montana Plaintiffs.[41] The *Johns-Manville* opinion is not dispositive of the Motions to Reconsider. The facts are distinguishable from those currently before

[38] *Inline Connection Corp. v. AOL Time Warner, Inc.*, 395 F.Supp. 2d 115, 117 (D. Del. 2005)(quoting *Dentsply Int'l, Inc., v. Kerr Mfg. Co.*, 42 F. Supp. 2d 385, 419 (D. Del.), *appeal dismissed* 215 F.3d 1348 (1999)). *See also Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1231, 1232 (3d Cir. 1995) (motions to alter or amend do not provide litigants with an opportunity for a "second bite at the apple").

[39] The Local Rule provides:

> Citation of Subsequent Authorities. No additional briefs, affidavits or other papers in support of or in opposition to the motion shall be filed without prior approval of the Court, except that a party may call to the Court's attention and briefly discuss pertinent cases decided after a party's final brief is filed or after oral argument.

[40] Letter from Daniel C. Cohn, Esquire to the Honorable Judith K. Fitzgerald Re: Injunction Pleadings, Doc. No. 478.

[41] Letter to Judge Fitzgerald re: Manville Opinion Filed by W.R. Grace & Co., et al., Doc. No. 479; Letter to Judge Fitzgerald re: Manville Opinion Filed by State of Montana, Doc. No. 480.

this court. In the present case, Debtors sought to expand the preliminary injunction preconfirmation to protect assets of their estates. The expansion of the injunction in *Johns-Manville* was sought postconfirmation by an insurer to protect it from statutory and common law claims based upon an alleged independent duty owed to plaintiffs in those actions. Although the "independent duty" theory in *Johns-Manville* is similar to that lodged against the State of Montana here, the basis for the injunction is different. Travelers conceded that the compensation sought for its alleged tortuous conduct was not related to proceeds of Manville's policies. *Id.* at *7. Furthermore, the plaintiffs did not rely on Manville's insurance policies nor seek to recover insurance proceeds for recovery. *Id.* In sum, there was no effect on the *res* of the Manville estate by the actions against Travelers, a nondebtor insurer, and the bankruptcy court had no subject matter jurisdiction to enjoin the type of suits at issue, postconfirmation, against Travelers. *Id.* at *11. Likewise the Court of Appeals opined that were this a § 524(g) matter, it would fall outside the parameters of that provision because the claims in question were nonderivative and had no effect on the estate's *res*. *Id.* at 11. This case is in the preconfirmation stage. It is more in line with the *Pacor* situation in that, as previously stated, if the State Court Actions were to have an effect on Debtors' estates there would have to be a judgment against the State of Montana which would then have to pursue its claims against Debtors in this bankruptcy case. The only similarity between *Johns-Manville* and the matter before us is the fact that the underlying state court litigation relies upon theories of liability that require proof of tortuous

conduct by a third party (the State) and damages that can be assessed against that third party without a direct impact on the Debtors' estates.

For the reasons stated herein, the Motions to Reconsider will be denied and the court's prior order will remain in effect. An appropriate order will be issued.

DATE: March 27, 2008.

/s/ Judith K. Fitzgerald
Judith K. Fitzgerald
United States Bankruptcy Judge

IN THE UNITED STATES
BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:
W. R. GRACE & CO., *et al.*,
Debtors.

W.R. GRACE & CO., *et al.*,
Plaintiffs,

-against-

MARGARET CHAKARIAN, *et al.*
and JOHN DOES 1-1000,
Defendants.

Chapter 11
Case No. 01-01139 (JKF)
(Jointly Administered)
Adversary No. A-01-771

ORDER GRANTING MODIFIED PRELIMINARY INJUNCTION

This matter came on for hearing on January 3, 2002 on the motion of W.R. Grace & Co. and certain of its subsidiaries (collectively, the "Debtors"), to modify the Preliminary Injunction staying all asbestos-related and fraudulent transfer claims against Affiliated Entities. On June 21, 2001, the Debtors, as plaintiffs in this adversary proceeding, filed [an] Amended Verified Complaint seeking entry of a preliminary injunction pursuant to Section 105(a) of the Bankruptcy Code and 28 U.S.C. § 1651

enjoining the commencement and/or further prosecution of the Actions against Affiliated Entities, as defined below.

A temporary restraining order ("TRO") was entered on April 2, 2001 enjoining the commencement or prosecution of Asbestos Actions against the Affiliated Entities. On April 12, 2001, the Court extended the TRO until April 24, 2001. On April 18, 2001, the Court set this matter for a preliminary injunction hearing on May 3, 2001, and entered a preliminary injunction barring the commencement or prosecution of Asbestos Actions against the Affiliated Entities until that time. On May 3, 2001, the Court granted Debtors' motion for a preliminary injunction, as modified in their reply brief, and issued a preliminary injunction barring the prosecution of currently pending asbestos-related actions and fraudulent transfer actions against certain affiliates of Debtors. Debtors have now moved to modify that preliminary injunction to add several additional claims and parties and to reinstate the bar against the commencement of new Actions against Affiliated Entities.

The following terms are defined for purposes of this Order:

1. "Fresenius" means National Medical Care, Inc.; Fresenius A.G.; Fresenius, U.S.A., Inc.; Fresenius Medical Care A.G.; and Fresenius National Medical Care Holdings, Inc.

2. "Sealed Air" means Sealed Air Corporation, Sealed Air Corporation (US), Cryovac, Inc., and Sealed Air (Canada) Inc.

3. "Merrill Lynch" means Merrill, Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch").

4. "CSFB" means Credit Suisse First Boston Corporation.

5. "Non-Debtor Affiliates" means affiliates of the Debtors that are not filing entities for purposes of these chapter 11 cases, as well as present and former officers, directors and employees of Debtors. The Non-Debtor Affiliates are listed in Exhibit A hereto.

6. "Insurance Carriers" means Maryland Casualty Company, Continental Casualty Company, their affiliates and any other insurer of the Debtors under the Insurance Policies as outlined on Exhibit B hereto who has been named as a defendant in actions pending in direct action states.

7. "Robinson" means Robinson Insulation, Co.

8. "Affiliated Entities" means Fresenius, Sealed Air, Merrill Lynch, CSFB, Insurance Carriers, Robinson and the Non-Debtor Affiliates. The Affiliated Entities are listed in Exhibit A.

9. The "Insurance Policies" are those insurance policies that may provide coverage for asbestos-related claims asserted against the Debtors. The Insurance Policies include those listed in Exhibit B.

10. The "Actions" means pending actions and actions that have not been filed or are not pending as of the date of entry of this Order as follows:

a) against Affiliated Entities that arise from alleged exposure to asbestos indirectly or directly allegedly caused by Debtors; or

b) for which there may be coverage under the Insurance Policies; or

c) against Affiliated Entities alleging fraudulent transfer or fraudulent conveyance claims;

d) against Insurance Carriers alleging coverage for asbestos-related liabilities;

or

e) against current or former officers, directors or employees of Debtors that arise out of such officer's, employee's or director's employment or relationship with Debtors except the action entitled *Robert Locke v. W. R. Grace and Robert Bettacchi*, No. 99-2530 (Mass. Sup. Ct., Middlesex Cty.) wherein the Debtors request for an injunction is continued to January 29, 2002 at 1:00 p.m. for further hearing.

The definition of "Actions" does not include the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's police or regulatory power, as outlined in section 362(b)(4) of the Bankruptcy Code.

In support of this Order, the Court finds that:

1. Without the injunctive relief sought, the Debtors would suffer the risk of irreparable harm, including potential diminution of estate property; and

2. The injunctive relief requested is in the best interests of the Debtors and their estates, creditors and other parties in interest;

3. This proceeding is a core proceeding pursuant to 28 U.S.C. § 158(a); and

4. This Order is without prejudice to the Debtors' or others' rights to seek relief pursuant to the automatic stay under 11 U.S.C. § 362.

After due deliberation and cause appearing therefore, accordingly:

IT IS HEREBY ORDERED that the prosecution of all of the following actions are stayed and enjoined pending a final judgment in this adversary proceeding or further order of this Court:

a. all Actions as defined above. Any additional Actions that are filed and served upon Affiliated Entities are, upon completion of service, stayed and enjoined pending a final judgment in this adversary proceeding or further order of this Court;

b. the action entitled *TIG Ins. Co. v. Smolker*, No. BC 173952 (Los Angeles County Superior Court) and all related appeals pending in the California Court of Appeals, Second Appellate District, consolidated as No. B 138229, in their entirety;

c. the State of Michigan, Dept. of Corrections' (the "State") third party action against Grace Dearborn Company and Betzdearborn, Inc. in the case entitled *Ruppel K. Perry v. State of Michigan. Dept. of Corrections v. Grace Dearborn Company, predecessor company of Betzdearborn, Inc.*, No. 95 15855 CM (Mich. Ct. Claims), but the Plaintiff, Ruppel K. Perry is not stayed and enjoined from proceeding with his Complaint against the State;

d. the action entitled *Ellison v. FPC Disposal, Inc.*, No. CJ-99-151-01, (Okla. Dist. Ct., Canadian Cty.) as to Samson Investment Company, Samson

Hydrocarbons Co. and their subsidiaries and affiliates (the "Samson entities") unless plaintiff Ellison identifies in writing to counsel for the Debtors any Samson affiliate not entitled to indemnification by the Debtors and counsel for the Debtors, within 20 days of such notification does not disagree with Ellison. In the event the Debtors disagree with Ellison's identification of a Samson affiliate that is not entitled to indemnification by the Debtors, Ellison shall only proceed against such Samson affiliate by further order of this Court after notice and a hearing;

e. the action entitled *Exxon Corp. v. Samson Hydrocarbons Co.*, No. CJ-99-390, (Okla. Dist. Ct., Creek Cty.) as to the Samson entities and plaintiff Exxon's Motion for Summary Judgment in this adversary proceeding (Docket No. 72) shall be continued for hearing to January 29, 2002 at 1:00 p.m; and

f. the action entitled *Youpee v. Samson Hydrocarbons Co.*, No. CV-98-108-BLD-JDS (D. Mont.) which has been conditionally settled in the Montana District Court and is thus stayed and enjoined herein as to the Samson entities only in the event that the conditions to the settlement are not met and the action is not dismissed by the Montana District Court as to the Samson entities.

Dated: January 22, 2002

/s/ Judith K. Fitzgerald_____
THE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES
BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:
W. R. GRACE & CO., *et al.*,
Debtors.

W.R. GRACE & CO., *et al.*,
Plaintiffs,

-against-

MARGARET CHAKARIAN, *et al.*
and JOHN DOES 1-1000,
Defendants.

Chapter 11
Case No. 01-01139 (JKF)
(Jointly Administered)
Adversary No. A-01-771

ORDER GRANTING PRELIMINARY INJUNCTION

This matter came on for hearing on May 3, 2001, on the motion of W.R. Grace & Co. and certain of its subsidiaries (collectively, the "Debtors"), for a Preliminary Injunction Staying All Asbestos-Related and Fraudulent Transfer Claims Against Affiliated Entities (the "Motion"). On April 2, 2001, the Debtors, as plaintiffs in this adversary proceeding, filed a Verified Complaint seeking entry of a preliminary injunction pursuant to Section 105(a) of the Bankruptcy Code and 28 U.S.C. § 1651 enjoining

further prosecution of the Actions against Affiliated Entities, as defined below. On April 2, 2001, the Court entered an Order Granting Temporary Restraining Order substantially granting the requested relief. On April 12, 2001, the Court entered an Order Extending Temporary Restraining Order; and at the April 18, 2001 status hearing the Court issued a preliminary injunction extending the stay through and including a hearing on the preliminary injunction requested in the Motion.

The following terms as defined for purposes of this Order:

1. "Fresenius" means National Medical Care, Inc.; Fresenius A.G.; Fresenius, U.S.A., Inc.,; Fresenius Medical Care A.G.; and Fresenius National Medical Care Holdings, Inc.

2. "Sealed Air" means Sealed Air Corporation, Sealed Air Corporation (US), and Cryovac, Inc.

3. "Merrill Lynch" means Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch").

4. "CSFB" means Credit Suisse First Boston Corporation.

5. "Insurance Carriers" means Maryland Casualty Company, Continental Casualty Company, their affiliates and any other insurer of the Debtors under the Insurance Policies who has been names as a defendant in actions pending in direct action states.

6. "Robinson" means Robinson Insulation, Co.

7. "Affiliated Entities" means Fresenius, Sealed Air, Merrill Lynch, CSFB, Insurance Carriers and Robinson.

8. The "Insurance Policies" are those insurance policies that may provide coverage for asbestos-related claims asserted against the Debtors.

9. The "Actions" includes any case filed or pending in any court as follows:

a) against Affiliated Entities that arise from alleged exposure to asbestos indirectly or directly allegedly caused by Debtors; or

b) for which there may be coverage under the Insurance Policies; or

c) against Affiliated Entities alleging fraudulent transfer or fraudulent conveyance claims; or

d) against Insurance Carriers alleging coverage for asbestos-related liabilities.

The definition of "Actions" does not include the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's police or regulatory power, as outlined in section 362(b)(4) of the Bankruptcy Code.

In support of this Order, the Court finds that:

1. Without the injunctive relief sought, the Debtors would suffer the risk of irreparable harm, including potential diminution of estate property; and

2. The injunctive relief requested in the best interests of the Debtors and their estates, creditors and other parties in interest;

3. This proceeding is a core proceeding pursuant to 28 U.S.C. § 158(a); and

4. This Order is without prejudice to the Debtors' or others' rights to seek relief pursuant to the automatic stay under 11 U.S.C. § 362.

After due deliberation and cause appearing therefore, accordingly:

IT IS HEREBY ORDERED that the prosecution of all Actions are stayed and enjoined pending a final judgment in this adversary proceeding or further order of this Court;

IT IS FURTHER ORDERED that this preliminary injunction does not apply to the pending motions to transfer venue to the District of Delaware filed in *Abner v. W.R. Grace & Co.*, no. 01-3070(TC)(N.D. Cal.), and *Woodward v. Sealed Air Corp. (US)*, No. 01 10547 PBS (D. Mass);

IT IS FURTHER ORDERED that nothing in this Order shall prevent anyone from providing notice to Insurance Carriers or other appropriate persons or entities or otherwise exercising their rights under the Insurance Policies, provided that they do not seek reimbursement or payment under any of the Insurance Policies without further order of this Court.

Dated: May 3, 2001

/s/ Joseph J. Farnan, Jr.
THE HONORABLE JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES
BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:
W. R. GRACE & CO., *et al.*,
Debtors.
W.R. GRACE & CO., *et al.*,
Plaintiffs,

-against-

MARGARET CHAKARIAN, *et al.*
and JOHN DOES 1-1000,
Defendants.

Chapter 11
Case No. 01-01139 (___)
(Jointly Administered)
Adversary No. A-01-771

ORDER GRANTING
TEMPORARY RESTRAINING ORDER

This matter having come on for hearing on April 2, 2001, on the request of W.R. Grace & Co. and certain of its subsidiaries (collectively, the "Debtors"), as Debtors and debtors in possession in the above-captioned jointly administered chapter 11 cases, the plaintiffs in the above-captioned adversary proceeding, having filed on April 2, 2001 a complaint in this adversary proceeding seeking entry of a temporary restraining order under Fed. R. Bankr. P. 7065, Section 105(a) of the Bankruptcy Code and 28 U.S.C. § 1651 enjoining further or future prosecution

of the Actions, as defined below, against Affiliated Entities, as defined below.

The following terms are defined for purposes of this Order.

1. "Non-Debtor Affiliates" means affiliates of the Debtors that are not filing entities for purposes of these chapter 11 cases, as well as present and former officers, directors and employees of Debtors. The Non-Debtor Affiliates are listed in Exhibit A hereto.

2. "Fresenius" means National Medical Care, Inc.; Fresenius A.G.; Fresenius, U.S.A., Inc.; Fresenius Medical Care, Inc.; and Fresenius National Medical Care, Inc.

3. "Sealed Air" means Sealed Air Corporation, Sealed Air Corporation (US), and Cryovac, Inc.

4. "Affiliated Entities" means the Non-Debtor Affiliates, Fresenius and Sealed Air.

5. The "Insurance Policies" are those insurance policies that may provide coverage for asbestos-related claims asserted against the Debtors.

6. The "Actions" means pending actions and actions that have not been filed or are not pending as of the date of entry of this Order as follows:

a) against Affiliated Entities that arise from alleged exposure to asbestos indirectly or directly allegedly caused by Debtors; or

b) against Non-Debtor Affiliates on account of which the Non-Debtor Affiliates may be entitled to coverage under the Insurance Policies; or

In support of this Order, the Court finds that:

1. Without the injunctive relief sought, the Debtors would suffer the risk of irreparable harm, including potential diminution of estate property in the form of Debtors' rights to insurance shared with Non-Debtor Affiliates; and

2. The injunctive relief requested in the best interests of the Debtors and their estates, creditors and other parties in interest; and

3. This proceeding is a core proceeding pursuant to 28 U.S.C. § 158(a).

4. This Order is without prejudice to the Debtors' or others' rights to seek relief pursuant to the automatic stay under 11 U.S.C. § 362.

After due deliberation and cause appearing therefore, accordingly:

IT IS HEREBY ORDERED that the prosecution and/or commencement of all Actions are temporarily restrained pending a resolution of plaintiffs' pending motion for a preliminary injunction;

IT IS FURTHER ORDERED that plaintiffs' motion for a preliminary injunction is set for hearing on April __, 2001 at _____.

IT IS FURTHER ORDERED that nothing in this Order shall prevent any Non-Debtor Affiliate from providing notice to insurance carriers or other appropriate persons or entities or otherwise exercising their rights under the Insurance Policies, provided that no Non-Debtor Affiliate shall seek reimbursement or payment under any of the Insurance Policies without further order of this Court; and

IT IS FURTHER ORDERED that this Order does not constitute a determination of the extent to which Debtors or any Non-Debtor Affiliate are entitled to coverage under the Insurance Policies.

Dated: April 2, 2001

/s/ Randall J. Newsome
Randall J. Newsome
JUDGE

AFFILIATED ENTITIES

A. Fresenius Entities.

1. National Medical Care, Inc.
2. Fresenius A.G.
3. Fresenius, U.S.A., Inc.
4. Fresenius Medical Care, Inc.
5. Fresenius National Medical Care, Inc.

B. Sealed Air Entities.

1. Sealed Air Corporation
2. Sealed Air Corporation (US)
3. Cryovac, Inc.

C. Non-Debtor Affiliates

1. Advanced Refining Technologies LLC
2. Advanced Refining Technologies LP
3. Advanced Refining Technologies Management, Inc.
4. Carbon Dioxide Slurry Systems LP
5. Construction Products Dubai, Inc.
6. Grace Asia Pacific, Inc.
7. Grace Chemicals, Inc.
8. Grace Collections, Inc.
9. Grace Germany Holdings, Inc.
10. Grace Foundation Inc.
11. Grace Management Services, Inc.
12. Grace Offshore Turnkey
13. Grace Receivables Purchasing, Inc.
14. Ichiban Chemical Co., Inc.
15. Grace Canada, Inc.
16. Debtors' current and former directors, officers and employees.